Supreme Court, U.S.
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No.

SUPREME COURT OF THE UNITED STATES

FRANCIS T. MANDANICI
Petitioner

v.

KENNETH W. STARR
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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74 pp

A. Questions Presented For Review

1. In the present case involving a grievance filed by the petitioner against the former independent counsel Kenneth W. Starr that was dismissed by the District Court after it refused to refer the matter to a bar counsel for an investigation as mandated by the Model Federal Rules of Disciplinary Enforcement, did the Eighth Circuit when it dismissed the appeal filed by the petitioner for lack of jurisdiction err by ignoring the fact that since the District Court publicly reprimanded and defamed the petitioner in its published ruling, then the petitioner had suffered an injury sufficient to give him standing to appeal and thus give the Eighth Circuit jurisdiction pursuant to the principles on such matters set forth by this Court in Spencer v. Kemna, 523 U.S. 1(1998), Lujan v. Defenders of Wildlife, 504 U.S. 555(1992), and Gladstone v. Village of Bellwood, 441 U.S. 91(1979)?

2. Does a Court of Appeals still have supervisory powers under La Buy v. Howes, 352 U.S. 249(1957) to hear an appeal filed by someone who might lack traditional standing if that appeal concerns the third different interpretation by judges of the same court of the key section of the Model Federal Rules of Disciplinary Enforcement?

3. In light of the national importance of this case because it involves an interpretation of an important federal disciplinary rule, and alleges conflicts of interest against the independent counsel who sought the impeachment of a President and also incorporates charges by the ethics advisor to that independent counsel that he had abused his powers as independent counsel by aggressively advocating for said impeachment, should this Court exercise its own supervisory powers over the federal courts and decide whether the District Court's interpretation of the disciplinary rule was erroneous rather than remanding the case to the Eighth Circuit?

B. List Of All Parties

The caption of the case lists all the parties.

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D. Citation Of Official And Unofficial Reports

The citation of the opinion from the District Court for the Eastern District of Arkansas is Mandanici v. Starr (Mandanici), 99 F. Supp. 2d 1019(E.D. Ark. 2000). That decision is also contained in the Appendix, pp. 3a-36a. The decision of the United States Court of Appeals For The Eighth Circuit has no official citation but is contained in the Appendix, p. 2a.

E. Statement Of The Basis For Jurisdiction

i. On July 19, 2000, the United States Court of Appeals For The Eighth Circuit filed its decision that is the subject of this petition.

ii. On September 26, 2000, the United States Court of Appeals For The Eighth Circuit denied the Petition For Rehearing With Suggestion For Rehearing Banc timely filed by the petitioner.

iii. The statute, which confers on this Court jurisdiction to review on a writ of certiorari the above judgment, is 28 U.S.C., Sec. 1254.

F. Constitutional And Statutory Provisions

The regulations involved in this case are Rules V and X of the Model Federal Rules of Disciplinary Enforcement that are lengthy and are set out in the Appendix, pp. 38a-40a.

G. Statement Of The Case

1. General Court History

The petitioner, Francis T. Mandanici (Mandanici) filed a grievance against Kenneth W. Starr in the United States District Court For The Eastern District of Arkansas, dated June 4, 1999(Grievance). The court, Nangle, J., dismissed the

grievance on the papers without appointing counsel to investigate any of the matters. Mandanici, supra, 99 F. Supp. 2d 1019, App. 3a. Mandanici timely filed an appeal. The Court of Appeals For The Eighth Circuit dismissed the appeal on the belief that it lacked jurisdiction. App. 2a. This present petition concerns that decision of the Eighth Circuit.

2. Facts of the Case

Mandanici filed said grievance pursuant to Rule V(A) of the Model Federal Rules of Disciplinary Enforcement. Mandanici at 1021, App. 4a. Rule V(A) outlines the procedures for filing grievances or "complaint[s]" against lawyers practicing in the District Court. App. 38a.

Mandanici, who is an attorney, also relied on Rule 8.3 of the Rules of Professional Conduct that states that

> "a lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Mandanici at 1021, n. 2, App. 4a, Grievance, 6.

Mandanici also relied on Ethical Consideration 1-4 of the A.B.A.'s Model Code of Professional Responsibility that states that the "integrity of the profession can be maintained **only** if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials." Grievance, 6(emphasis added)

Mandanici alleged that Starr, when he was acting as the Independent Counsel in the Whitewater investigation, suffered from conflicts of interest, or at least the appearance of conflicts of interest, involving 1) his simultaneous representation of tobacco companies while investigating a President who strenuously sought to curtail that industry, 2) his acceptance of a future job funded in large part by Richard

Mellon Scaife who was a severe critic of President Clinton, and 3) his investigation as independent counsel of officials at the Resolution Trust Corporation (RTC) who had sued his law firm. Grievance, pp. 44-54.

Mandanici in his Grievance, pp. 37-39, 47-49, relied heavily on this Court's opinion in Young v. U.S. Ex Rel Vuitton Et Fils, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740(1987) to support his allegation that Starr had violated ethical rules concerning conflicts. In Young, this Court in ruling that a special prosecutor had a conflict of interest observed that all prosecutors are required to be "disinterested". Id., 807. Referring to federal prosecutors, the Court noted that "the Justice Department has applied to its attorneys the ABA Model Code of Professional Responsibility, 28 CFR 45.735-1(b)(1986), which contains numerous provisions relating to **conflicts of interest**." Id, 803-804 (emphasis added). The Court observed that Ethical Consideration 5-1 of the A.B.A. Model Code of Professional Responsibility states that lawyers should be "free of compromising influences and loyalties", and that Ethical Consideration 9-6 states that lawyers have the "duty to avoid 'not only professional impropriety but **also the appearance of impropriety**' ". Id., 804, n. 14(emphasis added). The Court also referred to the Justice Department rule that requires federal prosecutors to avoid a situation that "creates or **appears to create a conflict of interest**." Id. [1]

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[1] Prosecutors must be free of even the appearance of a conflict of interest because they wield tremendous power that can be easily abused. In Young, supra, 807, this Court noted that prosecutors have "considerable discretion in matters such as the determination of which persons should be targets of investigation". The Court ruled that a prosecutor has the

> "power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who wield this power will be guided solely by their sense of public responsibility for the attainment of justice." Id., 814

Rule IV(B) of the Rules of Disciplinary Enforcement states that the ethical rules that apply in the District Court in Arkansas are those adopted by the Supreme Court of Arkansas. Those rules have clearly been interpreted as requiring the avoidance of impropriety and the avoidance of not only a conflict of interest but also even the appearance of a conflict of interest.[2]

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[2] The rules adopted by the Supreme Court of Arkansas are the Model Rules of Professional Conduct. See Matter Of Arkansas Bar Association, 287 Ark. 495, 702 S.W.2d 326(1985). Regarding the Model Rules adopted by the Supreme Court of Arkansas, that court has stated that its ethical rules require lawyers to avoid even the appearance of impropriety. The Arkansas Supreme Court in First American Carriers v. Kroger, 302 Ark. 86, 787 S.W.2d 669, 671(1990) affirmed the lower court's decision that an attorney's actions "create[d] that **appearance of impropriety** that the rules and prior decisions of this court require attorneys to **carefully avoid**" (emphasis added). The Arkansas Supreme Court stated that Canon 9 of ABA Code of Professional Responsibility requires that "a lawyer should avoid even the appearance of impropriety" and the court held that the "fact that Canon 9 is not in the Model Rules does not mean that lawyers no longer have to **avoid the appearance of impropriety**". Id., at 671 (emphasis added). The Arkansas Supreme Court ruled that "[w]hile Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit. It is included in what the preamble to the Rules refers to as 'moral and ethical considerations' that should guide lawyers, who have 'special responsibility for the quality of justice.' " Id., at 672(emphasis added).

More specifically concerning conflicts of interest, the Arkansas Supreme Court stated that it "has consistently taken strong positions in situations where the **public's confidence** in attorneys might be eroded by the **appearance of a conflict of interest**". Supra, 787 S.W. 2d at 671(emphasis added). The Court affirmed the lower court's disqualification of a law firm due to a conflict of interest because that firm's "continued representation ... would create that **appearance of impropriety** that the rules and prior decisions of this court require attorneys to **carefully avoid**." Id. (emphasis added).

Mandanici in his Grievance, pp. 23-39, also charged that Starr had violated ethical rules by violating the Independent Counsel Act and abusing the power of his office when he aggressively advocated for the impeachment of President Clinton in his public appearance before the House Judiciary Committee. Mandanici cited the resignation letter of Samuel Dash, who Starr had hired as an ethics expert. App. 41a-43a. In that letter to Starr, dated November 20, 1998, Dash stated that he was resigning because Starr had rejected his "strong advise" and personally appeared before the House Judiciary Committee and "serve[d] as an aggressive advocate for the proposition that ... President [Clinton] committed impeachable offenses." App. 42a. In his letter to Starr, Dash stated that

> **"you have violated your obligations under the Independent Counsel statute and have unlawfully** intruded on the power of impeachment which the Constitution gives solely to the House. As Independent Counsel you have only one narrow duty under the statute relating to the House's power of impeachment. That one duty, under Section 595(c) of the statute, is to objectively provide for the House substantial and credible information that may constitute grounds for impeachment.
>
> The statute does not, and could not constitutionally give the Independent Counsel any role in impeachment other than this single informing function....But your role and authority as a provider of information to the House stopped there. You have no right or authority under the law, as Independent Counsel, to advocate for a particular position on the evidence before the Judiciary Committee or to argue that the evidence in your referral is strong enough to justify the decision by the Committee to recommend impeachment....

> **By your willingness to serve in this improper role you have seriously harmed the public confidence in the independence and objectivity of your office.** Frequently you have publicly stated that you have sought my advice in major decisions and had my approval. I cannot allow that inference to continue regarding **your present abuse of your office** and have no other choice but to resign." App. 42a-43a (emphasis added).

In his Grievance, pp. 35-39, Mandanici argued that Starr violated various ethical rules when he violated the Independent Counsel Act. Mandanici cited a federal regulation that states that federal "employees shall endeavor to avoid any actions creating the appearance that they are violating the law." Standards Of Ethical Conduct For Employees Of The Executive Branch, 5 CFR, Sec. 2635.101 (b)(14). Mandanici noted that this Court in Young, supra, 481 U.S. at 804, note 14, stated that a prosecutor must "avoid not only professional impropriety but also the appearance of impropriety." Mandanici stressed that Starr's violation of the law was more culpable than usual because his personally chosen ethics expert, who received fees of almost $300,000.00, warned him that his actions would violate the law but Starr chose to ignore that warning. Mandanici also noted that a lawyer commits ethical violations when he knowingly commits an act that violates an ethical rule even if he had no specific intent to violate the rule. See C. Wolfram, Modern Legal Ethics, West Publishing Company, 1986, Sec. 3.3.1, pp. 88-89, Sec. 3.5.2, p. 120.

Mandanici also charged in his Grievance, pp. 14-22, that Starr and members of his staff had violated ethical rules by attempting to persuade witnesses to testify to matters that said witness had clearly stated were false.

All the judges of the Eastern District sua sponte disqualified themselves from hearing the grievance. The disqualification of the judges was noted in a letter dated

December 21, 1999, from the presiding judge of the District Court, Susan Webber Wright, to the Chief Judge of the Eighth Circuit, Roger N. Wollman. No explanation was given as to why all the judges disqualified themselves. Even judges who had not disqualified themselves from presiding over other Whitewater cases and cases involving President Clinton disqualified themselves from deciding the grievance against Starr. See Jones v. Clinton, 36 F. Supp. 2d 1118(E.D. Ark. 1999)(wherein Judge Wright held President Clinton in contempt); Mandanici at 1028, App. 19a (noting that Judge Howard was the judge who presided at the trial of Susan McDougal).

On December 29, 1999, Chief Judge Wollman, pursuant to 28 U.S.C., Sec. 292(b), designated Judge Warren K. Urbom of the District of Nebraska to rule on the matter. However, Judge Urbom disqualified himself on January 26, 2000. Thereafter on February 1, 2000, Chief Judge Wollman designated Judge John F. Nangle, J., from the Eastern District of Missouri, to decide the grievance.

Judge Nangle dismissed the grievance on the papers and refused to appoint counsel to conduct an investigation as mandated under Rule V(A) of the Rules of Disciplinary Enforcement. Mandanici at 1019, App. 3a, Rule V(A), App. 38a. Judge Nangle ruled that the proof provided by Mandanici did not satisfy the level of proof required by the court's interpretation of Rule V(A).

Judge Nangle's interpretation gave the court the discretion to refuse to appoint said counsel unless Mandanici or any complainant first already had substantiated or verified his allegations of misconduct, which would in effect actually negate the need for the court to appoint counsel to conduct an investigation. Mandanici at 1026-1028, App. 15a-19a. Although Judge Nangle's interpretation is more fully discussed later, pp. 25-28, he basically ruled that the **"allegations must be substantiated before counsel is appointed"** Mandanici at 1027, App. 17a (emphasis added).

Judge Nagle ruled that Mandanici did not meet the standard for the appointment of counsel because he had not provided evidence that substantiated his charges that Starr had violated ethical rules. Mandanici at 1021, 1028-1036, App. 4a-5a, 19a-35a

Judge Nangle not only refused to refer the matter to counsel for an investigation, but in his ruling he ridiculed and defamed Mandanici by stating that his claims against Starr were "ridiculous", "absurd", "frivolous", "nonsense" and "the stuff that dreams are made of." Mandanici at 1031, 1033, 1028, n.17, 1035, 1033, App. 25a, 29a, 18a, 33a, 29a. Judge Nangle stated that he "finds no reason to waste further time and money of the American people by acting on the unsupported, or clearly refuted ... and at times, patently frivolous..., opinions and inferences set for by Mr. Mandanici.". Mandanici at 1028, n.17, App. 18a

Concerning whether Starr suffered from the appearance of a conflict of interest involving the tobacco companies, Judge Nangle noted Mandanici's contention that the tobacco companies had strong ties to the Republican Party and had a campaign to remove President Clinton from office but concluded that it was "nonsense" to contend that Starr suffered from even an appearance of a conflict of interest when he represented the tobacco companies at the same time that he was investigating President Clinton. Mandanici at 1035-1036, App. 32a-35a. Judge Nangle based his conclusion on his observation that Mandanici had offered "no evidence that the tobacco companies represented by Starr attempted to influence his investigation" or that Starr "tailored his work as Independent Counsel in an attempt to please the tobacco companies." Mandanici at 1035, App. 33a. Judge Nangle referred to 1996 media articles in which Dash was quoted as stating that Starr did not violate any ethical rules by representing private clients when he was investigating the President. Judge Nangle then extrapolated those 1996 statements that never specially referred to the tobacco companies as constituting a formal and continuous opinion by

Dash that Starr never had even the appearance of a conflict of interest involving the tobacco companies. Mandanici at 1036, App. 34a-35a. But Dash did say that Starr's representation of private clients in general while investigating the President did have "an odor to it." Mandanici at 1035, App. 33a.

Concerning the Scaife conflict, Judge Nangle noted that news reports indicated that Scaife had used his fortune to press a media campaign against President Clinton, and also that Scaife reportedly contributed over $1 million of the $3 million start up costs for Pepperdine University's new School of Public Policy where Starr had accepted an offer to become dean at a *future* time. Mandanici at 1032, App. 27a. Judge Nangle stated that the fact that Scaife contributed $1 million of the $3 million start up costs for a school where Starr was to become dean "does not suggest that [Starr] was incapable of carrying out his duties as Independent Counsel without bowing to the political desires" of Scaife. Mandanici at 1032, App. 27a-28a. Judge Nagle stated that he found "no evidence that Starr's consideration of the deanship at Pepperdine ... affected his performance as Independent Counsel or created an appearance of a conflict of interest." Mandanici at 1033-1034, App. 30a.

Regarding the Scaife conflict, Judge Nangle noted that Mandanici had stated that Starr ultimately decided not to take the Pepperdine deanship but that Mandanici argued that the conflict involving Scaife still existed since Scaife not only had ties to the specific job that Starr had agreed to take but Scaife had ties to other possible jobs at conservative institutions that Starr might accept since Scaife had contributed $620 million to such institutions. Mandanici at 1033, App. 28a-29a. Judge Nangle ruled that such a claim was "the stuff that dreams are made of" and was "absurd". Mandanici at 1033, App. 29a.

Regarding the conflict involving Starr investigating the Resolution Trust Corporation at the same time it was suing his law firm, Judge Nangle's answer was that any such conflict was inconsequential because the Justice Department never actually removed Starr as Independent Counsel after

learning of the matter. Mandanici at 1034-1035, App. 30a-32a. Rather than deal with the clear appearance of a conflict of interest, Judge Nangle merely ignored it by stating that Mandanici had presented "no evidence that the presence of this lawsuit affected Starr's ability to carry out his duties as Independent Counsel." Mandanici at 1034, App. 31a.

Concerning the charges by Starr's ethics expert that Starr had violated the Independent Counsel Act and abused the power of his office, Judge Nangle opined that when Dash resigned due to that violation and abuse, he was merely offering his opinion which is not binding on anyone. Mandanici at 1030-1031, App. 23a-25a. Rather than have the matter investigated, Judge Nangle merely stated that Starr was a "very knowledgeable, well respected attorney" and it would be "ridiculous" to investigate any such allegations against him even if his personally chosen ethics expert made the basic allegation. Mandanici at 1031, App. 24a, 25a.

Regarding Mandanici's claim that Starr and or members of his staff had attempted to persuade witnesses to testify to matters that said witnesses had clearly stated were false, Judge Nangle basically ruled that Mandanici had no hard evidence of such solicitation and that it "is doubtful that such question would even be asked if the prosecutor were anyone other than an Independent Counsel." Mandanici at 1028-1030, App. 19a-22a.

Having exonerated Starr of any wrongdoing and defaming Mandanici in the process, Judge Nangle then reprimanded Mandanici for allegedly leaking certain matters to the press. Mandanici at 1036-1037, App. 35a-36a.

Judge Nangle never gave Mandanici any prior notice that he was considering issuing such a reprimand. The reprimand of Mandanici was reported in an Associated Press article that was published on May 21, 2000 in The Washington Post. App. 44a. That article noted that the "judge said Mandanici might merit discipline and sanctions himself for violating the judge's order against leaking matters related to the case to the news media."

Furthermore, an editorial in The Washington Post published May 24, 2000 and read by perhaps millions of people, noted that Judge Nangle had used "unusually strong language" to dismiss the ethical charges against Starr brought by a "Connecticut lawyer named Francis Mandanici". App. 46a. The editorial stated that Judge Nangle found Mandanici's allegation that "Starr harbored a potential conflict of interest with respect to conservative philanthropist Richard Mellon Scaife as 'the stuff that dreams are made of.' He [Judge Nangle] called other allegations 'nonsense' and 'ridiculous'". App. 46a. The editorial concluded that "Judge Nangle's opinion offers powerful vindication on some of the leading ethical charges" against Mr. Starr. App. 46a.

Mandanici filed an appeal. The respondent, the United States on behalf of Starr then filed a Motion Of The United States To Dismiss Appeal For Lack Of Subject Matter Jurisdiction, dated June 20, 2000. Mandanici filed a Plaintiff's Response And Objection To Defendant's Motion To Dismiss Appeal, dated July 12, 2000. That response contained the arguments that Mandanici is presently raising in this petition. Since that response was in excess of the page limits for such a pleading, Mandanici filed with that response a Plaintiff's Motion To File Response To Motion In Excess Of 20 Pages, dated July 12, 2000.

The Eighth Circuit in a very short ruling granted the said motion of the United States to dismiss and stated merely

> "The appeal is dismissed for lack of jurisdiction. See In re Starr, 152 F.3d 741, 752(8th Cir. 1998). Mr. Mandanici's motions to unseal the district court file and for leave to file an overlength response and the government's motion to correct the caption are denied as moot." App. 2a.

It is possible that the Court did not even read Mandanici's response since it denied him permission to file an overlength response. Mandanici filed a Petition For Rehearing that was denied. App. 37a.

H. Argument

1. Jurisdiction Based On Mandanici's Injury And Personal Interest

The Eighth Circuit dismissed Mandanici's appeal "for lack of jurisdiction" and cited its earlier decision of In re Starr v. Mandanici, supra,152 F.3d 741. App. 2a. That decision concerned earlier grievances filed by Mandanici against Starr in which Mandanici made similar charges involving conflicts of interest. Concerning that earlier grievance, Judge Eisele of the District Court stated in a preliminary Memorandum that

> "it is difficult to argue that Mr. Starr is not laboring under at least an appearance of conflict.... It appears that Mr. Starr may be involved in a third-party conflict of interest-that is, 'the independent counsel has an obligation to a non client third party that could compromise the independent counsel's neutrality in a matter under investigation.'(citation omitted). Even if not true in fact, there is the inevitable appearance that Mr. Starr may consciously or subconsciously tailor his prosecutorial decisions to please his benefactor [Mr. Scaife]." In Re Starr (Starr I), 986 F. Supp. 1144, 1154(E.D. Ark. 1997)(Memorandum of Eisele, J., contained in recusal decision of Wilson, J.).

The District Court, in a 3-1 decision, subsequently dismissed the grievance without appointing counsel to investigate, stating that the matters "do not warrant further action by this Court." In Re Starr (Starr II), 986 F. Supp. 1159, 1163(E.D. Ark. 1997).

Judge Eisele issued a strong dissenting opinion, stating that

> "Today the Court holds, in part, that it should not look behind or investigate further the appearance of a serious conflict of interest on the part of Independent

> Counsel Kenneth W. Starr, and it makes that determination without addressing at all the substance of that apparent conflict.... For the reasons set forth in my [earlier] Memorandum Opinion, I believe that Mr. Starr is laboring under the appearance of a serious conflict of interests stemming from the Pepperdine-Scaife allegations. No one has challenged that conclusion." Id., 1163, 1168(Eisele, J., dissenting).

Mandanici appealed that dismissal to the Eighth Circuit, which dismissed his appeal on the grounds of lack of jurisdiction due to his lack of standing to appeal. Starr v. Mandanici, supra, 152 F.3d at 741. The Eighth Circuit cited that decision when it dismissed Mandanici's present appeal. App. 2a.

In the earlier decision, the Eighth Circuit basically ruled that it lacked jurisdiction because Mandanici lacked standing since he had not suffered any injury and his interest was no greater than that of any other citizen in the country. Starr v. Mandanici, supra, 152 F.3d at 747-750.[3]

Mandanici in this present petition contends as he did in his pleadings to the Eighth Circuit, that unlike the earlier grievance he has suffered an *injury* caused by Judge Nangle's decision and has a *personal interest* in that decision separate and distinct from other citizens. The injury and personal interest consist of Judge Nangle's reprimand of Mandanici for allegedly violating court orders and Judge Nangle's defamation of Mandanici when he stated in his published opinion that Mandanici's claims were "ridiculous", "absurd", "frivolous", "nonsense" and "the stuff that dreams are made of." Mandanici at 1031, 1033, 1028, n.17, 1035, 1033, App. 25a, 29a, 18a, 33a, 29a. An editorial in The Washington Post

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[3] However, Judge McMillian in a lengthy footnote stated that he agreed with Judge Eisele that Starr suffered from at least an appearance of a conflict of interest that triggered the District Court's duty under Rule V(A) to refer the matter to counsel for an investigation. Starr v. Mandanici, supra, 152 F.3d at 746-747, n. 15.

identified Mandanici and quoted Judge Nangle's findings that Mandanici's claims were "the stuff that dreams are made of", "nonsense" and "ridiculous". App. 46a.

Concerning the reprimand, Judge Nangle made the following announcement at the end of his ruling:

"**A FINAL MATTER**

> At the time this matter was assigned to this writer, the parties were informed that the assignment of the matter and all issues related to it would remain under seal until further order of this Court. Even though he is appearing pro se, Mr. Mandanici is an attorney and knows the meaning of these words. Mr. Mandanici was obviously the source of a news report that appeared in a Connecticut paper indicating that the Court had accepted assignment of the matter and indicated that Mandanici 'has a case.' See Thomas Scheffey, *Catch a Falling Starr?* CONNECTICUT LAW TRIBUNE, Feb. 22, 2000. This interview and leak **was a violation of this Court's Order and was false. Another improper disclosure resulted in an article in an Arkansas paper**. See Linda Satter, *Judge Named to Handle Grievances Against Starr*, ARKANSAS DEMOCRAT-GAZETTE, February 9, 2000.
>
> In addition, Mandanici submitted a copy of a letter in this matter to a person who clearly should not have received such a copy. **This conduct constitutes three direct violations of this Court's Order**. Unlike the inferences and assumptions that formed the basis of Mandanici's complaints about Starr's conduct, **Mandanici's three known violations of this Court's Order** merit serious consideration of both discipline and sanctions, matters that this Court may consider at a later date." Mandanici at 1036-1037, App. 35a-36a (emphasis added).

Although Judge Nangle's reprimand was not the result of a formal disciplinary proceeding, it is nonetheless a reprimand which Mandanici must report on any application to become a member of another bar, etc. For example, the application for admission to the bar of this Court contains the following question "12. (a) Have you ever ... received any public ... reprimands from any ... court".

Judge Nangle's statement that Mandanici violated the court's orders constituted a reprimand by publication.

> "A public reprimand derives its sanctional power from **humiliation**. It exposes to public view the fact of the lawyer's misconduct and its condemnation by the ... court.... **A different form of sanction by humiliating** exposure occasionally employed by courts is **punishment by publication.** It resembles a public reprimand in that a court uses its power to publish judicial decisions in order to excoriate a lawyer for assertedly unprofessional conduct". Charles Wolfram, Modern Legal Ethics, West Publishing Co., 1996, pp. 127-128(emphasis added).

The first time Mandanici learned that the court believed he had done anything improper was when reporters for the Associated Press informed him that the court had released a decision which not only absolved Starr but which had reprimanded Mandanici. The Associated Press story no doubt ran in many newspapers and was published in The Washington Post where it was noted that the "judge said Mandanici might merit discipline and sanctions himself for violating the judge's order against leaking matters related to the case to the news media." App. 44a.

Since a reprimand constitutes public "humiliation", Wolfram, supra, then Mandanici obviously has been injured by the court's reprimand which he sought to appeal. The public reprimand is a form of defamation that injures Mandanici's reputation in the community. Libel means to "defame someone in a permanent medium, esp. in writing."

Blacks Law Dictionary, Seventh Edition. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts, Sec.559. A "publication is defamatory if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654(D.C. Cir. 1966).

The reprimand in the present case constitutes the type of personal interest or injury that qualifies Mandanici as having enough standing to appeal. A person has standing if he or she has a "**personal stake** in the outcome" of the proceeding. Spencer v. Kemna, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed.2d 43(1998)(emphasis added). The injury must be concrete and particularized, not conjectural or hypothetical, and must "**affect the plaintiff in a personal and individual way**." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, note 1, 112 S. Ct 2130, 119 L. Ed.2d 351(1992) (emphasis added). A person has standing to appeal if he or she can show that their "individual rights would be vindicated" by an appeal. Gladstone v. Village of Bellwood, 441 U.S. 91, 99-100, 99 S. Ct. 1601, 60 L. Ed.2d 66(1979). The Eighth Circuit has held that a "non party normally has standing to appeal when it is adversely affected by" the court's ruling. In re Piper Funds, 71 F.3d 298, 301(8th Cir. 1995).[4]

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[4] If allowed to appeal the court's reprimand, Mandanici would offer the defense that although the court sealed the file, the court also stated that his "participation in the investigation stop[ped]" and his "involvement cease[d]" once he filed the complaint. Mandanici at 1025-1026, App. 13a, 15a. Thus anything revealed to Mandanici at a later time was public since he had no greater standing than any other member of the public. The Eighth Court in Starr v. Mandanici, supra, 152 F.3d at 748, 749, stated that Mandanici lacked standing because his interest in the case was "no greater than any other citizen's" and the Court "has rejected claims of standing predicated on the right possessed by every citizen". Since the file concerning the present case was sealed, the District Court clerk's office would not even give Mandanici a copy of the docket sheet

The above process in which Mandanici was reprimanded without notice or the chance to defend himself, violated due process. "Fundamental to the concept of **due process** is notice to the subject of a contemplated judicial action.... The notice must inform the lawyer of the nature of the charges against him or her in sufficient detail to permit the lawyer to prepare a defense." Wolfram, supra at 102(emphasis added). "Attorneys subject to discipline are 'entitled to **procedural due process which includes fair notice** of the charge.' In re Buffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed.2d 117(1968)." Matter of Jacques, 972 F. Supp. 1070, 1078-1079(E.D. Tex. 1997)(emphasis added). Judge Nangle transformed a grievance against Starr into a de facto grievance against Mandanici. Since Starr could have appealed even the mildest reprimand of him, then certainly Mandanici should also be allowed to appeal the court's reprimand against him especially since he was never given any prior notice.

In addition to the above reprimand, Judge Nangle also defamed Mandanici by ruling that his claims against Starr were "ridiculous", "absurd", "frivolous", "nonsense" and "the stuff that dreams are made of." Mandanici at 1031, 1033, 1028, n.17, 1035, 1033, App. 25a, 29a, 18a, 33a, 29a. Judge Nangle stated that he "finds no reason to waste further time and money of the American people by acting on the unsupported, or clearly refuted ... and at times, patently frivolous..., opinions and inferences set for by Mr. Mandanici.". Mandanici at 1028, n.17, App. 18a. Such statements are defamatory.

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that he needed to prepare his appeal. In the previous grievance many matters were sealed and kept from Mandanici. Starr II, supra, 986 F. Supp. at 1160, 1162-1165. Since Mandanici's "involvement cease[d]" when he submitted the grievance, and since the Eighth Circuit had ruled that he was no different than any other citizen and since many matters have been filed without his knowledge, then it was natural for him to believe that anything the court released to such an average citizen could be shared with other citizens.

Not only is Judge Nangle's opinion defaming Mandanici published in the Federal Supplement, but The Washington Post in an editorial read by perhaps millions of people, noted that the court had used "unusually strong language" to dismiss ethical charges against Starr brought by a "Connecticut lawyer named Francis Mandanici". App. 46a. The editorial stated that the court found Mandanici's allegation that "Mr. Starr harbored a potential conflict of interest with respect to conservative philanthropist Richard Mellon Scaife as '**the stuff that dreams are made of**.' He [Judge Nangle] called other allegations '**nonsense**' and '**ridiculous**'". The editorial concluded that "Judge Nangle's opinion offers **powerful vindication** on some of the leading ethical charges" against Starr (emphasis added). App. 46a.

As mentioned earlier, a statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him", Restatement, supra; or "tends to injure plaintiff in his ... profession or community standing, or lower him in the estimation of the community." Afro-American Publishing Co., supra.

Judge Nangle's statements that Mandanici's views were "absurd", "ridiculous", "frivolous", "nonsense", and what "dreams are made of" were defamatory statements since said statements clearly injured Mandanici's reputation and lowered his reputation in the community, and in his profession as an attorney. Other courts which will decide issues raised by Mandanici in future cases will be influenced by a published precedent in which a court has described past arguments of Mandanici as absurd, ridiculous, frivolous, and what dreams are made of. Current and future clients who will become aware of the decision will have a lower opinion of Mandanici.[5]

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[5] Although Judge Nangle ridiculed Mandanici, it should be noted that Mandanici's ethical charges primarily relied on, or were adopted by, people whose integrity would not be so easily assailed. For example, Starr's personally chosen ethics advisor, Samuel Dash, in his resignation

Furthermore, characterizing Judge Nangle's statements as merely opinion does not negate their defamatory nature since the statements were based on his conclusion of fact, that is that Starr had not engaged in unethical conduct. Judge Nangle stated that all the charges against Starr "have been fully considered on the merits and denied." Mandanici at 1021, App. 5a. "[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." Moldea v. New York Times Co., 22 F.3d 310, 313(D.C. Cir. 1994). Thus if Mandanici can establish that Starr had violated ethical rules, then Judge Nangle's implicit factual foundation will be eroded.

Also, to prevail in a libel action Mandanici need not show actual damages. "One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication." Restatement

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letter to Starr stated that Starr had "violated [his] obligations under the Independent Counsel statute", had exercised power when he had "no right or authority under the law" to exercise such power, had "seriously harmed the public confidence in the independence and objectivity of [his] office", and had "abuse[d the power of his] ... office." App. 42a-43a. Concerning Starr's conflict of interest involving Scaife, Judge Eisele of the District Court stated concerning the earlier grievance that "Starr is laboring under the appearance of a serious conflict of interests stemming from the Pepperdine-Scaife allegations. No one has challenged that conclusion", and there is "the inevitable appearance that Mr. Starr may consciously or subconsciously tailor his prosecutorial decisions to please his benefactor" Mr. Scaife. Starr II, supra, 986 F. Supp. at 1168(Eisele, J., dissenting), Starr I, supra, 986 F. Supp. at 1154(opinion of Eisele, J., contained in recusal opinion of Wilson, J.). Judge McMillian of the Eighth Circuit agreed with Judge Eisele's conclusions. Starr v. Mandanici, supra, 152 F.3d at 746, note 15. But when Mandanici makes the allegations, Judge Nangle calls such allegations "the stuff that dreams are made of" and "absurd". Mandanici at 1033, App. 29a. Also, The New York Times on different occasions going back to 1994 has called on Starr to resign or relinquish part of his duties due to the circumstances surrounding his appointment and his conflicts of interest. See New York Times editorials of August 18, 1994, March 31, 1996, and April 17, 1996.

(Second) of Torts, Sec. 569. "[I]t is defamatory per se to make false statements which prejudice a person in his or her profession or trade." Swengler v. ITT Corp., 993 F.2d 1063, 1070(4th Cir. 1993)(internal citations omitted). "A written publication is libelous per se, ... actionable without proof of special damages..., if, among other things, it tends to harm one in his business or occupation." Hardy v. Saliva Diagnostic Systems, Inc., 995 F. Supp. 258, 268(D. Conn. 1997).

As noted above, a person has standing if he or she has a "personal stake in the outcome" of the proceeding, Spencer, supra, 523 U.S. at 7; has been "affect[ed] ... in a personal and individual way", Lujan, supra, 504 U.S. at 560, n.1; can show that their "individual rights would be vindicated" by an appeal, Gladstone, supra, 441 U.S. at 99-100. A "non party normally has standing to appeal when it is adversely affected" by the court's ruling. In re Piper Funds, supra, 71 F.3d at 301.

Judge Nangle's defamation of Mandanici affects him personally and gives him a personal stake in that decision since an attorney's reputation is his "primary asset" and is "the basis of [his] livelihood". Agee v. Paramount, 114 F.3d 395, 398-399(2nd.Cir. 1997). This Court can provide a remedy for the injury to Mandanici's reputation by ordering the Eighth Circuit to hear his appeal so that it could reject Judge Nangle's views that the allegations against Starr are frivolous, absurd, ridiculous, and nonsense. Filing a grievance against Judge Nangle would not provide a remedy since it would be dismissed as directly relating to the merits of an opinion. 28 U.S.C. Sec. 372(c)(3)(A)(ii). Except for a possible civil libel action against Judge Nangle, Mandanici has no other remedy other than an appeal. A civil action might be possible if Mandanici is not allowed to appeal since the normal barrier to such an action is the immunity given to judges and that evaporates if a normal appeal is disallowed.[6]

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[6] "The purpose of the rule of absolute judicial immunity is to protect the integrity of the judicial process.... Factors a court should consider in determining judicial immunity include .... 'the correctability of

Thus this Court should grant certiorari since the Eighth Circuit's ruling that it lacked jurisdiction because Mandanici lacked standing to appeal is a ruling that conflicts with this Court's rulings in Spencer v. Kemna, supra, Lujan v. Defenders of Wildlife, supra, and Gladstone v. Village of Bellwood, supra, all of which describe a type of personal interest or injury sufficient to convey standing, and Mandanici's personal interest and injury are well within the parameters set forth in those cases.

Furthermore, prior to its recent ruling on the merits concerning the recount of votes in Florida, this Court granted a stay requested by Governor George Bush, finding that he would suffer "irreparable harm" due to the "cloud" that might harm his political stature if the Court did not immediately stop the recount. Bush v. Gore, 531 U.S. , No. 00-949, Ruling granting stay, December 9, 2000(Scalia, J., concurring). In effect the Court ruled that if the recount had first showed that Bush lost and then this Court subsequently overturned that recount, Bush's reputation and standing as the duly elected President would suffer irreparable damage. But if such potential damage to Bush's reputation and standing was sufficient enough to meet the very high standard of irreparable harm, then surely as a matter of equal protection, Judge Nangle's actual reprimand and defamation of Mandanici was sufficient enough to satisfy the much lower standard of injury and interest that would give Mandanici standing to take an ordinary appeal.

For this Court to allow a double standard by which the privileged receive the benefit of the law while others receive dust, "can only lend credence to the most cynical appraisal of

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error on appeal ... [and] the presence of safeguards that reduce the need for private damage actions as a means of controlling unconstitutional conduct. Cleavinger [v. Sawyer, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L. Ed.2d 507(1985)]." Fariello v. Campbell, 860 F. Supp. 54, 68(E.D.N.Y. 1994). Thus if Mandanici can not appeal Judge Nangle's defamation of him and there are no other safeguards to correct the wrong, then the grounds for judicial immunity erode and Mandanici can bring a lawsuit.

the work of judges throughout the land ... [and erode] the Nation's confidence in the judge as an impartial guardian of law." Bush v. Gore, 531 U.S. , No. 00-949, Ruling granting writ of certiorari, December 12, 2000 (Stevens, J., dissenting, slip op, p.7)

2. Refusal By The Eighth Circuit To Even Consider It's Supervisory Powers.

It is absolutely clear that even if Mandanici lacked traditional standing to take an appeal, the Eighth Circuit still had jurisdiction if it chose to exercise its supervisory power. As noted by Judge McMillian in Starr v. Mandanici, supra, 152 F.3d at 750, Courts of Appeal have supervisory powers over the District Courts and can consider appeals filed by people who are not parties. Judge McMillian stated that the Court should not exercise that power concerning Mandanici's previous appeal because of his "lack of personal interest in this litigation .... [and he] cannot demonstrate any injury peculiar to him ... ,[and thus] this court is reluctant to exercise its supervisory authority over the district court in this context." Id. Judge McMillian noted that supervisory power could be exercised if the person filing the appeal claimed that his common law rights were affected or implicated, but Judge McMillian found that no such rights were affected. Id. As noted above, in the present case Judge Nangle actually inflicted an injury on Mandanici that is peculiar to him.

However, even if Mandanici did not suffer any injury, the Eighth Circuit should have exercised its supervisory powers and reviewed the merits of the grievance as it did another grievance in Mattice v. Meyer, 353 F.2d 316(8th Cir. 1965). In that case, the "evidence had been fully developed" by the lower court which then dismissed the grievance because there was "no basis in fact or in law to support" it. Id., 318. On appeal, the Court ruled that the person who filed the grievance had no standing to appeal. Id., 319. However, the

Court then exercised it supervisory powers and reviewed the merits of the grievance, stating that

> "[b]ecause of the serious implications of the allegations of the complaint which, if true, could militate against the right of respondent to remain a member of the bar..., we have looked beyond the technical aspects of the situation to ascertain whether there is any factual support for the accusations. We unhesitatingly conclude that there is absolutely no foundation for the allegations of the complaint, and no merit in the additional innuendoes... There is not a shred of evidence indicating any impropriety." Id.

This Court has stated that "[w]e believe that supervisory control of the District Courts by the Courts of Appeal is necessary to proper judicial administration in the federal system." La Buy v. Howes, 352 U.S. 249, 259-260, 77 S. Ct. 309, 1 L. Ed.2d 290(1957). In La Buy, this Court decided a petition that was filed not by one of the parties in the original lawsuit but by a District Court judge who became the subject of a mandamus order from the Court of Appeals concerning some of his rulings. Id., 250, 254. In the case of In Re Globe Newspaper Company, Petitioner, 920 F.2d 88, 90, 91(1st Cir. 1990), the First Circuit exercised its supervisory power to consider an appeal that was filed by an entity that was not a party and then ruled that the District Court had erred in not following one of its local rules.

Thus the Eighth Circuit had the same power as in the Mattice case to review the merits of Mandanici's appeal. The Court should have exercised that discretion due to the national importance of the case and the fact that Judge Nangle's interpretation of Rule V(A) constituted the third different interpretation of that rule by the same court. As Judge Eisele noted, the issues involving whether the independent counsel had conflicts of interest are matters in which "every inhabitant of this land has a vital interest." Starr I, supra, 986 F. Supp. at 1153. Judge McMillian noted that the "propriety [of Starr's

investigation is] ... undoubtedly of national import". Starr v. Mandanici, supra, 152 F.2d at 748.

A Court of Appeals has the discretion under its supervisory power to decide an appeal filed by a nonparty if the matter "affects newsgathering." In Re Globe Newspaper Co., supra, 920 F.2d at 90. The present case not only affects newsgathering, it is the news since The Washington Post in an editorial stated that "Judge Nangle's opinion offers powerful vindication on some of the leading ethical charges" against Starr. App. 46a. Judge Nangle wanted his vindication of Starr to be the final word on this national issue. Judge Nangle stated that his goal was that "other complainants and future courts in which similar charges may be filed will know that these matters have been fully considered on the merits and denied" and "[h]opefully, the following analysis ... puts them to rest." Mandanici at 1021, 1028, App. 5a, 19a.[7]

If "future courts" will, as Judge Nangle hoped, use his decision as controlling precedent on such a national issue, then that decision should be subject to the usual process of appeal. The nature of this present petition does not require a rebuttal of Judge Nangle's conclusions although that would be provided if page limitations allowed. However, as noted earlier, note 5, Judge Nangle's conclusions that Starr did not suffer from even the appearance of a conflict of interest and had not violated any law or ethical rule are opinions that many people other than Mandanici would find unreasonable.

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[7] It is unfortunate that in such a politically sensitive case, Judge Wollman chose a judge who prior to his appointment by President Richard Nixon was the Republican of the Year in Missouri, the President of the Missouri Association of Republicans, and was on the Republican National Committee. See Almanac of the Federal Judiciary. As Justice Scalia has astutely observed, "judges have been known to be" "politically partisan". Morrison v. Olson, 487 U.S. 654, 730, 108 S. Ct. 2597, 101 L. Ed.2d 569(1988)(Scalia, J., dissenting). The tone and substance of Judge Nangle's ruling "lend[s] credence to the most cynical appraisal of the work of judges throughout the land." See Bush v. Gore, supra, 531 U.S. , No. 00-949, Ruling granting writ of certiorari, December 12, 2000 (Stevens, J., dissenting, slip op, p.7)

In addition to the national importance of the case, the Eighth Circuit should have exercised its supervisory powers because Judge Nangle's interpretation of Rule V(A) constituted the third different interpretation of that important disciplinary rule. Judge McMillian in Starr v. Mandanici, supra, 152 F.3d at 750, stated that Courts of Appeals have supervisory powers over District Courts and he cited this Court's ruling in La Buy v. Howes, supra, 352 U.S. at 259-260. In La Buy, this Court noted that "exceptional circumstances" existed warranting the use of supervisory powers and that the "subject concerns the enforcement of the rules which by law it is the duty of this court to formulate and put into force." Id., 256.

In the present case, the Eighth Circuit should have exercised its supervisory powers regarding whether Judge Nangle erred in refusing to appoint counsel to conduct an investigation since his decision was based on a misinterpretation of Rule V(A) of the Rules of Disciplinary Enforcement. Judge Nangle's interpretation gave the court the discretion to refuse to appoint said counsel unless the complainant first substantiated or verified his allegations of misconduct, which would in effect actually negate the need for the court to appoint counsel to conduct an investigation. Mandanici at 1026-1028, App. 15a-19a.

> Rule V(A) states that
> "[w]hen misconduct or **allegations of misconduct which, if substantiated**, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, ... the Judge **shall refer the matter to counsel for investigation** and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate." App. 38a (emphasis added).

Appointing such counsel is a relatively easy task since Rule X states that the Court should appoint the bar counsel for the Supreme Court of Arkansas. App. 40a. This Court can take judicial notice that the same bar counsel office is presently pursuing a grievance against President Clinton.

Judge Nangle ruled that the phrase 'if substantiated' in Rule V(A)

> "**requires** the judge to make two preliminary determinations prior to making a referral. Initially, the judge must determine whether there is **substantiated evidence of misconduct or substantiated allegations of misconduct**. If so, the judge must determine whether a fuller investigation of the conduct or allegation would reveal that discipline is warranted. If both questions are answered affirmatively, the Court then refers the matter to counsel for investigation." Mandanici at 1027, App. 16a (first emphasis in original, other emphasis added).

Judge Nangle stated that the "**allegations must be substantiated before counsel is appointed**" Mandanici at 1027, App. 17a (emphasis added).

Judge Nangle ignored the other parts of the Rules of Disciplinary Enforcement which provide that the substantiation of the allegations is to be done by a court appointed counsel whose duty is to investigate the allegations and if he or she can obtain proof of a level that satisfies a probable cause standard then a show cause order is issued to the attorney to respond. Once counsel is appointed under Rule V(A) to conduct an "investigation" of the allegations, Rule V(B) provides that "[s]hould counsel conclude **after investigation** and review that a formal disciplinary proceeding should not be initiated against the respondent–attorney **because sufficient evidence is not present,** .... counsel shall file with the Court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral or otherwise setting forth the reasons thereto." App.

38a (emphasis added). If a complainant first had to provide evidence that actually substantiated the misconduct before the court decided to appoint counsel, then there would be no Rule V(B) allowing the counsel to find that evidence insufficient.

If the counsel finds that there is sufficient evidence, the next step is provided under Rule V(C) which states that to "initiate formal disciplinary proceedings, counsel shall obtain an order of this Court upon a **showing of probable cause** requiring the respondent-attorney to show cause ... why the attorney should not be disciplined." App. 38a(emphasis added)..

Thus Judge Nangle had the cart before the horse since he held that a complainant to initiate an investigation by a court appointed counsel must first supply proof that satisfies a standard greater than that which is required for the court appointed counsel to initiate disciplinary proceedings. If a complainant must first substantiate the allegations, then that places the burden on the complainant to actually prove the allegations, while the burden of the court appointed counsel to initiate formal disciplinary proceedings is lower and only requires probable cause. To 'substantiate' means "[t]o establish the existence or truth of a fact, etc., esp. by competent evidence; to verify". Black's Law Dictionary. Verify means "[t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate". Id. Since to substantiate means to prove, then under Judge Nangle's scenario the complainant must first prove the allegations before the court is required to appoint counsel.

The degree of proof of mere probable cause to initiate later formal disciplinary proceedings after an investigation is lower than that required of the complainant to initiate the investigation. Probable cause "does not [mean] ... more likely true than false." Texas v. Brown, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed.2d 502(1983). "[P]robable cause requires a probability ... of criminal activity not an actual showing of such activity." Illinois v. Gates, 462 U.S. 213, 243-244, note 13, 103 S. Ct. 2317, 76 L. Ed.2d 527(1983).

Thus Judge Nangle's interpretation of Rule V(A) is wrong because it ignores Rules V(B) and V(C). Judge Nangle's interpretation is an absurd result because it places a higher standard on a complainant to obtain court appointed counsel than it does on the court appointed counsel to initiate a formal disciplinary hearing in which the attorney is required to show cause why he should not be disciplined.

> "Over and over we have stressed that 'in expounding a statute, we must not be guided by a single sentence ..., but look to the provisions of the whole law, and to its object and policy.' (citation omitted).... Statutory construction 'is a holistic endeavor,' (citation omitted), and, at a minimum, must account for a statute's full text". United States National Bank Of Oregon v. Independent Insurance Agents Of America, Inc., 508 U.S. 439, 455, 113 S. Ct. 2173, 124 L. Ed.2d 402(1993).

Furthermore, Rule V(A) states that if there are "**allegations** of misconduct which, if substantiated, would warrant discipline, ... the Judge shall refer the matter to counsel for **investigation**". (emphasis added). If the complainant first had to substantiate the allegations, that is to prove them to be already true, then they are no longer allegations but truth.

Also it is very important to note that Judge Nangle's interpretation of Rule V(A) conflicts with the interpretations of both the majority and minority in the earlier grievance. The minority stated that the Rule "creates a mandatory, ministerial and nondiscretionary duty to refer this matter to counsel for an investigation and report." Starr I, supra, 986 F. Supp. at 1149 (opinion of Eisele J., referring to the minority opinion). Even the majority "accept[ed] that the plain language of the Model Federal Rule and a strict, textualist reading of the plain language would require the referral ... [But the court concluded that the Rules should] permit some discretion" Id. Judge McMillian stated the mandatory

interpretation of the minority should be adopted. Starr v. Mandanici, supra, 152 F.3d at 745, note 12. The analysis by Judge Nangle was not an adaptation of the Rule but an "interpretation.... [based on the actual] language of the Rule" and "the canons of statutory construction". Mandanici at 1027, App. 16a.

The Eighth Court should have exercised its supervisory powers because the same court has interpreted the rule 3 different ways: a plain language interpretation requiring the appointment of counsel, a plain language interpretation that is mandatory but which can be ignored, and a plain language interpretation that is not mandatory and requires the exercise of the court's discretion prior to the appointment of counsel.

Thus this Court should grant certiorari because the Eighth Circuit failed to recognize its supervisory powers and that failure conflicts with this Court's opinion in La Buy v. Howes, supra, wherein this Court clearly stated that Courts of Appeal have the supervisory power to decide appeals concerning court rules even if that appeal is filed by someone who is not a typical party. This Court should also grant certiorari because the case involves matters in which "every inhabitant of this land has a vital interest", Starr I, supra, 986 F. Supp. at 1153, and involves a very dubious interpretation of a national rule concerning disciplinary proceedings covering a multitude of attorneys.

3. This Court's Supervisory Power

Although the Eighth Circuit never ruled on the issue of Judge Nangle's interpretation of Rule V(A), this Court has the power to forego remanding the case to the Eighth Circuit and can rule on the legality of that interpretation without such a remand. "This Court may exercise its inherent supervisory power to ensure that ... local rules [of a District Court] are consistent with the 'principles of right and justice.'(citation omitted)." Frazier v. Heebe, 482 U.S. 641, 645, 107 S.Ct.

2607, 96 L.Ed.2d 557(1987). Considering the national importance regarding the interpretation of Rule V(A), and considering the national importance of this case in general, then this Court should not only grant certiorari but should presently rule on the correct interpretation of Rule V(A) without any remand to the Eighth Circuit.

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I. Appendix

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1. RULING OF THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2545EALR	*	
	*	
Francis T. Mandanici,	*	Appeal from the
Appellant,	*	United States District Court
	*	for the Eastern District
vs.	*	Arkansas
	*	
Kenneth W. Starr,	*	
Appellee	*	

JUDGMENT

The appeal is dismissed for lack of jurisdiction. See In re Starr, 152 F.3d 741, 752(8th Cir. 1998). Mr. Mandanici's motions to unseal the district court file and for leave to file an overlength response and the government's motion to correct the caption are denied as moot. (5361-010199)

July 19, 2000

Order Entered at the Direction of the Court
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

2. RULING OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED MAY 18, 2000
JAMES W. MCCORMACK, CLERK
By Dennis J. Wysocki DEP Clerk

IN RE: FRANCIS T. MANDANICI	)	
	)	
v.	)	99-MC-160
	)	
KENNETH W. STARR	)	

ORDER

Pursuant to 28 U.S.C., Sec. 292(b), Chief Judge Roger L. Wollman, of the United States Court of Appeals for the Eighth Circuit, designated this writer to handle the within matter. That designation was necessitated by the action of all of the judges of the Eastern District of Arkansas in recusing themselves. See Order dated Dec. 28, 1999 (Doc. 1). The matter before the Court is a June 4, 1999 letter grievance filed by Francis T. Mandanici (hereinafter "Mandanici IV").[1] This Court will now proceed.

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[1] Both the Eighth Circuit and the district court have previously referred to Mandanici's September 11, 1996 letter grievance as "Mandanici I" and his March 11, 1997 letter grievance as "Mandanici II." See Starr v. Mandanici, 152 F.3d 741, 742-43 (8th Cir. 1998); In re Starr, 986 F. Supp. 1159, 1160 (E.D. Ark. 1997). The district court previously referred to Mandanici's June 19, 1997 letter grievance as "Mandanici III." In re Starr, 986 F. Supp. at 1160. Accordingly, for purposes of clarity, this Court will call Mandanici's June 4, 1999 letter grievance "Mandanici IV," although it appears that Mandanici has actively pursued Starr in other forums as well, including an attempt to secure the attention of the United States Supreme Court. In Mandanici IV, Mandanici admits that he submitted a grievance to the United States Supreme Court regarding his allegation that Dash's resignation as Starr's ethical advisor suggests that Starr violated the

Pursuant to Rule V(A) of the Model Federal Rules of Disciplinary Enforcement and Rule 8.3 of the Arkansas Rules of Professional Conduct,[2] Mandanici asks the Court to commence grievance proceedings against Kenneth W. Starr. Mandanici IV at 1, 6. Specifically, Mandanici asks the Court to appoint counsel to investigate several different allegations of prosecutorial misconduct by Starr and members of the Office of Independent Counsel (hereinafter "OIC"). Id. at 1-2. After considering all applicable law and the arguments of the parties, this Court has determined that it has the authority and the duty to evaluate the evidence before it prior to referral to counsel for investigation. Having performed a review and evaluation of the controlling legal authorities and of all of the allegations and other material filed by grievant Mandanici, this Court, acting within its discretion, denies Mandanici's request for appointment of counsel for the reasons set forth in this opinion.

Having considered Mandanici's allegations on the merits and exercised its discretion to deny Mandanici's request that counsel be appointed to investigate his grievances against

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Independent Counsel Act. Mandanici IV at 24. As is further admitted, the Supreme Court responded to Mandanici's April 7, 1999 request by stating that "this Court does not impose discipline on an attorney unless a state has done so." Mandanici IV at App. 73a (April 20, 1999 letter from William K. Suter, Clerk of Court, United States Supreme Court to Francis T. Mandanici). This response further suggests that Mandanici also requested action by the Supreme Court at an even earlier date. Id. ("As Chief Deputy Clerk Francis J. Lorson explained to you in his letter of August 28, 1998, ..."). For a detailed background of Mandanici's extensive history of filing ethical complaints against Starr and other individuals, see Judge Eisele's opinion in In re Starr, No. LR-M-97-91, slip. op. at 2-3 (E.D. Ark. May 30, 1997.)

[2] Under Rule 8.3, "[A] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Ark. R. Prof. Cond. 8.3.

Starr and the OIC, this Court is under no duty to explain its reasoning. However, because similar complaints have been filed by Mandanici and others in multiple jurisdictions, this Court will set forth its full analysis so that Mandanici, other complainants and future courts in which similar charges may be filed will know that these matters have been fully considered on the merits and denied.

BACKGROUND OF PREVIOUS GRIEVANCES

The letter grievance at issue stems from ongoing efforts by Francis T. Mandanici to persuade the judges of the Eastern District of Arkansas to sanction Kenneth Starr and the OIC for alleged prosecutorial misconduct in several different matters related to the investigation and subsequent impeachment of President Clinton. In a letter dated September 11, 1996 (hereinafter "Mandanici I"), Mandanici addressed an "ethics grievance" to the District Judges of the United States District Court for the Eastern District of Arkansas, complaining that Starr violated "ethical rules concerning conflicts of interest during the course of what is widely known as the Whitewater investigation." Starr v. Mandanici, 152 F.3d 741, 742-43 (8th Cir. 1998). In Mandanici I, Mandanici requested that the judges refer the matters "to counsel for investigation and the prosecution of a formal disciplinary proceeding," pursuant to Rule V(A) of the Model Federal Rules of Disciplinary Enforcement. Mandanici also sought disbarment, suspension, reprimand or other sanctions against Starr. Id. at 743.

The district judges referred the matter to the Attorney General, pursuant to 28 U.S.C., Sec. 596.[3] On February 7,

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[3] Pursuant to 28 U.S.C., Sec. 596, the Attorney General has the power to remove an Independent Counsel:

(a) Removal; report on removal.—

(1) Grounds for removal.- An independent counsel appointed under this chapter may be removed from office, other than by

1997, Michael E. Shaheen, Jr., counsel with the Office of Professional Responsibility of the Department of Justice (hereinafter "DOJ"), responded to the judges' referral and explained that the DOJ would take no action on the grievance. Shaheen stated that the "'materials that have been presented ... do not contain allegations of any conduct by [] Starr that can be viewed as so 'extreme' as to call for the Attorney General's use of the extraordinary power of removal.'" Id. at 743 (quoting from Michael E. Shaheen, Jr.'s letter to then Chief Judge Reasoner of Feb. 7, 1997) (alteration in original). Shaheen did concede, however, that "Judge Starr at one time may have suffered a technical conflict of interest" with respect to his investigation of the Resolution Trust Corporation (hereinafter "RTC").[4] Shaheen stated, however, that it is "clear that no such conflict exists at this point." In re Starr, No. LR-M-97-91, slip. op. at 3 (E.D. Ark. May 30, 1997) (hereinafter "May 30, 1997 Mem. Op.").

In a letter dated March 11, 1997 (hereinafter "Mandanici II"), Mandanici amended his grievance to the district court. In Mandanici II, Mandanici reiterated his allegations that Starr suffered a conflict of interest with regard to the RTC. Mandanici further alleged that Starr was laboring under a conflict of interest as a result of Starr's announcement that he planned to accept a deanship at the School of Public Policy ("SPP") at Pepperdine University. Mandanici contended that the SPP received a substantial endowment from

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impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical and mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties.
28 U.S.C., Sec. 596(a).

[4] See infra for a complete discussion and analysis of the RTC allegation.

Richard Mellon Scaife, a reported long-time opponent of President Clinton and alleged contributor in the efforts to implicate Clinton in the Whitewater scandal as well as in other scandals. Starr v. Mandanici, 152 F.3d at 743. In Mandanici II, Mandanici argued that the Court could employ lesser sanctions against Starr, even if his alleged misconduct did not mandate removal from his position. May 30, 1997 Mem. Op. at 4.

In deciding whether to consider Mandanici's grievances, the judges of the Eastern District of Arkansas "crossed this uncharted terrain with hesitation and caution." Id. at 5. The Court sought advice from Judge John Garrett Penn of the United States District Court for the District of Columbia, as well as from Attorney General Reno and the Special Division that appointed Starr. On May 8, 1997, Judge Sentelle responded to the Court on behalf of the Special Division. Judge Sentelle explained that the Special Division only had the authority to appoint the Independent Counsel and had no authority to rule on allegations of Starr's possible ethical violations. Judge Sentelle noted, however, that an Independent Counsel could be subject to sanction by the courts before which he practices or of whose bar he is a member if the Independent Counsel engages in ethical violations. Id.

The judges of the Eastern District of Arkansas then requested the opinion of Chief Judge Harry T. Edwards of the District of Columbia Circuit Court of Appeals on his possible consideration of Mr. Mandanici's allegations. Chief Judge Edwards stated that his Court would require either a complaint to the court or alleged misconduct in a proceeding before the court before it would refer a matter to the court's committee on grievances. Id. at 5-6. On May 21, 1997, Shaheen of the DOJ responded to the judges' inquiry. Shaheen explained that " '[a]n Independent Counsel is subject to discipline by the Department of Justice only through the statutory removal mechanism.'" However, the DOJ declined to " 'offer a view of whether Mr. Mandanici's allegations might warrant further

inquiry by [the] Court.'" Id. at 6 (quoting letter dated May 21, 1997, from Michael E. Shaheen, Jr. to Hon. G. Thomas Eisele).

After these efforts, Judge Eisele issued a Memorandum Opinion and Order on Mandanici I and Mandanici II on May 30, 1997. In that opinion, Judge Eisele concluded that "none of the other potentially involved and interested courts feels that it has jurisdiction or an appropriate basis for considering the conflict-of-interests issues which have been brought to the Court's attention by Mr. Mandanici, and, as noted above, the Attorney General finds no basis for action by her office." Id. at 6. Judge Eisele addressed several different issues in this opinion, including Mandanici's possible standing, the Court's authority to hear the grievance, the interpretation of Rule V(A) and the merits of Mandanici's allegations.

On August 1, 1997, the district court filed its first published opinion in this matter. In re Starr, 986 F. Supp. 1144 (E.D. Ark. 1997) (hereinafter "Starr I"). In that opinion, Judges Roy, Woods and Wilson recused themselves from considering Mandanici's grievances, stating that they were "friends of the Clintons [who are] the targets of the Independent Counsel."[5] Id. at 1156. Those judges chose to recuse after determining that the decision to appoint counsel under Rule V(A) was discretionary, rather than ministerial. Id. at 1156-57.

On October 2, 1997, the judges of the Eastern District of Arkansas dismissed Mandanici's grievances. In re Starr, 986 F. Supp. 1159 (E.D. Ark. 1997) (hereinafter "Starr II"). Judge Wright [6] explained that "a majority of the judges in the

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[5] Judge Moody had earlier recused himself from consideration of this matter. Id. at 1155.

[6] Then Chief Judge Reasoner and Judge Howard concurred with Judge Wright's opinion. Id. at 1163. Judge Eisele concurred in part and dissented in part. Judges Wilson, Moody, Roy and Woods recused themselves and took no part in the opinion. Id. at 1165.

Eastern District of Arkansas have concluded that the determination of whether to open an investigation of an attorney based on allegations of misconduct is not a ministerial act mandated by our rules but is a matter of discretion." Id. at 1160. Further, the Court stated that it was "unaware that Mr. Starr has ever acted in an improper or unethical manner in the matters over which this Court has presided [and] [i]n the absence of specific evidence of misconduct. . ., this Court declines the opportunity to provide Mr. Mandanici a forum for the pursuit of his 'vendetta.'" Id.

The Court explained that the DOJ "reviewed the precise allegations set forth in Mandanici II" and declined to sanction Starr. Id. The Court, however, acknowledged that the DOJ's control over Starr is limited to "the Attorney General's power of removal in appropriate circumstances," id., which is a higher threshold than that needed by the Court to impose lesser sanctions. Nevertheless, the Court still emphasized that the Attorney General "determined that the RTC matter does not support the proposition that such a conflict substantially impairs Mr. Starr's current ability to carry out the duties of his office and that there is no evidence with respect to the Pepperdine University matter that would suggest Mr. Starr is unable to put aside his personal political views while carrying out his duties as Independent Counsel." Id. (citing to letters of Michael E. Shaheen, Jr., dated Feb. 7, Feb. 24 and May 6, 1997). The Court noted that "these conclusions speak for themselves," regardless of the standard of review. Id. The Court also dismissed the allegations made by Mandanici in Mandanici III. Id. at 1162.[7]

Mandanici appealed the district court's dismissal. On June 23, 1998, the Eighth Circuit dismissed Mandanici's

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[7] On June 19, 1997, Mandanici filed a third letter grievance against Kenneth Starr ("Mandanici III"), alleging that the OIC improperly leaked grand jury information about Susan McDougal and Hillary Clinton. This allegation was based on a June 1, 1997 article in New York Times Magazine. Id. at 1160, 1162.

appeal, holding that Mandanici had no standing "to pursue his grievance in the district courts of the circuit beyond informing those courts of alleged misconduct, and no standing to appeal." Starr v. Mandanici, 152 F.3d 741, 751 (8th Cir. 1998). The three circuit judges on the panel each wrote separate opinions. Judge McMillian held that Mandanici lacked standing but noted his belief that the district judges erred in finding that Rule V(A) of the Model Federal Rules of Disciplinary Enforcement was discretionary. Judge McMillian explained that the Rule should be interpreted as providing a mandatory duty to appoint counsel to investigate. Id. at 745 n.12. Further, Judge McMillian "[took] issue with the weight that the district court accorded to both the DOJ's letter and Mandanici's alleged personal or political animus in filing the underlying complaints . . . ." Id. at 746 n. 15. Finally, Judge McMillian stated his belief that the judges erred in requiring specific evidence of misconduct to establish an appearance of misconduct under Rule V(A) and felt that the judges should have reached the merits of Mandanici's underlying allegations. Id. Judge Beam concurred in part with Judge McMillian's opinion. Judge Beam agreed that Mandanici lacked standing to bring "either an initial action or an appeal." However, Judge Beam opined that the Eighth Circuit's analysis should stop there. Id. at 751. Judge Beam explained that "[i]f the district court 'decides not to proceed with the matter, the complainant has no recourse.'" Id. (quoting Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965)).

Judge Loken also agreed that Mandanici lacked standing but disagreed with Judge McMillian's discussion of the merits of Mandanici's allegations. Id. at 752. Judge Loken discussed the Independent Counsel Act and cited several historical examples of the achievements of partisan prosecutors. Judge Loken noted that "[i]f independent counsel are to accomplish the purposes for which successive Congresses have created and consistently supported that Office, general allegations of partisanship, past political

activity and future political ambition cannot be grounds to disqualify an independent counsel or to launch a distracting judicial investigation." Id. at 756.

BACKGROUND OF MANDANICI'S CURRENT ALLEGATIONS

In Mandanici IV, Mandanici argues that the Court should appoint counsel to investigate whether Starr and his staff committed prosecutorial misconduct by "attempting to solicit false incriminating evidence against President Clinton," as indicated by defense witnesses during the 1999 trial of Susan McDougal. Mandanici IV at 3. Mandanici also refers the Court to a letter written by Sam Dash, Starr's former ethical advisor. Id. at 3, App. 71a (Dash's Nov. 20, 1998 letter to Starr). According to Mandanici, Dash's letter of resignation as Starr's ethical advisor suggests that Starr exceeded his duties under the Independent Counsel Act, 28 U.S.C., Sec. 595(c), when Starr chose to testify at the hearing on impeachment before the House Judiciary Committee on November 19, 1998. Id. at 3, 32, App. 71a-72a, 76a (Statement of Starr before Committee on the Judiciary, U.S. House of Reps.).

Further, Mandanici asks the Court to note a third matter that is already under investigation in the United States District Court for the District of Columbia. Id. at 3. Chief Judge Norma Holloway Johnson held that certain news reports established a "prima facie case" that Starr and the OIC violated grand jury secrecy rules under Fed. R. Crim. P. 6(e)(2). Id. at 3, App. 1a (In re Grand Jury Proceedings, Misc. No. 98-228, 1998 U.S. Dist. LEXIS 17290 (D.D.C. Sept. 25, 1998)). Chief Judge Johnson therefore appointed a special master "to collect and review evidence" and then submit the findings to the Court. Id. at App. 8a (Grand Jury Proceedings, 1998 U.S. Dist. LEXIS 17290, at *33). Mandanici argues that this matter should be "used as grounds for the Court to

reconsider the dismissal of [his] earlier grievance which was based in part on the Court's view that there was no other evidence of misconduct by Mr. Starr." Id. at 4.[8]

Mandanici also asks the Court to reconsider his previous letter grievances, which contained several allegations that Starr was laboring under conflicts of interest. These alleged conflicts included Starr's announcement that he intended to accept a deanship at the School of Public Policy at Pepperdine University in February 1997. Id. at 45; see also Starr II, 986 F. Supp. at 1168. The SPP is a school funded largely by the contributions of Richard Mellon Scaife, a supporter of conservative organizations and a Clinton opponent. Although the evidence presented by Mandanici concedes that Scaife and Starr had never met, Scaife played no part in the selection of Starr for the deanship and Starr never accepted the deanship, Mandanici nonetheless alleges that Starr's relationship with SPP or any conservative organization funded by Scaife constitutes a direct conflict of interest.

Additionally, Mandanici contends that Starr suffered a conflict of interest when he investigated the RTC in connection with the Whitewater affair at the same time that RTC was engaged in a lawsuit with Starr's law firm, Kirkland & Ellis. Id. at 52. Finally, Mandanici argues that Starr labored under a conflict of interest when he represented tobacco companies while he was working as the Independent Counsel. Id. at 49. Mandanici contends that the tobacco industry's ties with the Republican party were sufficient to create an appearance of impropriety for Starr. Id. at 50-51. Mandanici contends that Starr and his staff acted improperly in each of

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[8] Mandanici makes a similar request regarding a current DOJ investigation in which Attorney General Reno is attempting to determine whether Starr "gave false statements to the Justice Department in order to obtain expansion of his jurisdiction to cover the Monica Lewinsky matter." Mandanici IV at 5, 42-43. Like the matter before Chief Judge Johnson, there is no need for this Court to use the DOJ's investigation as support for considering Mandanici's present grievances.

the above instances and asks the Court to appoint counsel to investigate all of these matters.

STANDING

Initially, the Court will address the question of whether Mandanici has standing to bring this grievance. Mandanici asserts that he has standing to bring an ethical grievance against Starr, pursuant to Rule V(A) of the Model Federal Rules of Disciplinary Enforcement and Rule 8.3 of the Arkansas Rules of Professional Conduct. Mandanici IV at 6. With regard to the previous three Mandanici letter grievances, the Eighth Circuit held that a citizen has standing to bring a Rule V(A) ethics grievance to the attention of the Court, but the citizen's participation in the investigation stops there. Starr v. Mandanici, 152 F.3d at 748, 750-51.[9] Judge McMillian explained that Rule V(A) does not "elevate[] Mandanici's status above that of an informant." Id. at 751.[10] Judge Beam

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[9] Mandanici concedes this limited role, stating, "My standing to file this present complaint is in accord with the Eighth Circuit's ruling that a citizen or lawyer has the 'standing to complain or inform the court of alleged misconduct.' [Mandanici, 152 F.3d at 748]. It is conceded, however, that once I file this complaint, I then lack formal standing to obtain any relief." Mandanici IV at 6.

[10] The Seventh Circuit issued a similar ruling. In In re Continental Steel Corp., No. 91-3387, 1992 WL 133897, at * 1 (7th Cir. June 17, 1992), the bankruptcy court declined to refer the appellants' grievance report to the Indiana Disciplinary Commission of the Indiana Supreme Court pursuant to Rule V(A) of the Rules of Disciplinary Enforcement for the Southern District of Indiana, finding no fraudulent behavior. The district court determined that the bankruptcy court's findings were not clearly erroneous. On appeal, the Seventh Circuit held that appellants lacked standing to appeal. The court wrote:

> [b]y bringing their Report to the bankruptcy court, the appellants did not initiate a lawsuit or become parties to a disciplinary proceeding but simply served as informants to the court .... Even if the reporting person is a party or counsel to a party in the case where the ethical violation has occurred, the role of a party or

further explained that "if [Mandanici's] letters were simply treated as disciplinary grievances, then the district court had inherent power to consider the substantive allegations contained therein. Otherwise, if they were treated as complaints filed by Mr. Mandanici as a party to the action, the district court had no jurisdiction to consider the merits." Id. (citations omitted). Judge Beam further noted:

> A person who files an ethics grievance concerning a particular attorney does nothing more than "suppl[y] information for the court's consideration." He does not thereby "initiate an action." If the district court "decides not to proceed with the matter, the complainant has no recourse." Therefore, Mr. Mandanici's current effort before this court must be construed as an attempt to invoke our Article III jurisdiction to seek review of an unappealable event.

Id. (citations omitted).

This rule has been articulated in prior Eighth Circuit cases. In Eaton v. Gerdes, the Eighth Circuit held that an informant seeking sanctions against his former attorney " 'merely supplied information for the court's consideration'" and "lacked standing to appeal the District Court's decision not to discipline the attorney." Eaton v. Gerdes, No. 97-2326, 1997 WL 572151, at *1 (8th Cir. Sept. 16, 1997) (per curiam) (citing Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965)). Other circuits have also applied this rule in different situations. See Ramos Colon v. United States Attorney for the Dist. of P.R., 576 F.2d 1, 2, 6, 9 (1st Cir. 1978) (A former defendant "cannot challenge the court's decision not to discipline .... It remains for the court to vindicate its authority, if it so

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counsel ends after a report has been submitted to the court. "It remains for the court to vindicate its authority."

Id. at *2 (citations omitted) (emphasis added).

chooses."); see also Application of Phillips, 510 F.2d 126, 126 (2nd Cir. 1975) (per curiam) (pro se litigant in previous matter could not compel court to sanction opposing counsel because "a private person . . . has no standing to participate in a disciplinary proceeding"). Accordingly, the Court holds that Mandanici may bring his allegations of misconduct to this Court's attention, but his involvement ceases at that point.

INTERPRETATION OF RULE V(A)

Before proceeding on the merits of Mandanici's allegations, the Court must first determine whether Rule V(A) of the Model Federal Rules of Disciplinary Enforcement creates a mandatory duty to refer any allegation of misconduct to counsel for investigation or whether the Rule provides the Court with some discretion to determine whether a referral is required.[11] Initially, the judges of the Eastern District of Arkansas differed in their analysis of the Rule. Ultimately, however, the Eastern District of Arkansas judges unanimously determined that under Rule V(A), the judges of the court had discretion in determining whether to refer a grievance to

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[11] The Court has adopted the Model Federal Rules of Disciplinary Enforcement and the Model Rules of Professional Conduct. Starr v. Mandanici, 152 F.3d at 742 n.1. Mod. Fed. R. Disc. Enf. V(A) provides that:

> When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

Mod. Fed. R. Disc. Enf. V(A).

counsel for investigation.[12] Starr I, 986 F. Supp. at 1156. This Court agrees that Rule V(A) is not ministerial. Rather, the Court finds that it is permitted—indeed required—to exercise discretion in determining if referral is necessary.

The language of Rule V(A) supports an interpretation that allows discretion in making referrals. This Court finds that the language of the Rule, which begins "When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney," requires the judge to make two preliminary determinations prior to making a referral. Initially, the judge must determine whether there is substantiated evidence of misconduct or substantiated allegations of misconduct. If so, the judge must determine whether a fuller investigation of the conduct or allegation would reveal that discipline is warranted. If both questions are answered affirmatively, the Court then refers the matter to counsel for investigation.[13]

The application of the canons of statutory construction to the Rule supports this Court's analysis. Under any other interpretation, the phrase "if substantiated," would be superfluous. It goes without saying that counsel appointed to investigate would have to substantiate allegations of misconduct before presenting findings to the Court. There is no reason to spell that out in the Rule. Consequently, the inclusion of the phrase "if substantiated" must mean something else. See Babbitt v. Sweet Home Chapter of

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[12] In separate opinions, all of the judges in the Eastern District (except for Judge Moody who recused himself from the beginning) have agreed that this Court should be given reasonable discretion to determine whether to refer a grievance to counsel for investigation. See May 30, 1997 Mem. Op. at 9-10; Starr I, 986 F. Supp. at 1156.

[13] Actually, there is a third element which the Court must consider before appointing counsel to investigate an allegation of misconduct and that is whether "the applicable procedure is not otherwise mandated by these Rules...." There is no evidence that the procedure that the Court should follow is otherwise mandated by these Rules.

Communities for a Great Oregon, 515 U.S. 687, 698, 115 S. Ct. 2407, 132 L. Ed.2d 597(1995) (articulating "a reluctance to treat statutory terms as surplusage"). It seems more reasonable to interpret the phrase as modifying "allegations of misconduct," meaning that the allegations must be substantiated before counsel is appointed. This interpretation permits judges to exercise their discretion in evaluating the credibility of the allegation, thereby providing a safeguard against the appointment of counsel to investigate baseless allegations founded on rumor, innuendo, prejudice or emotion.[14]

Without the requirement of specific evidence, the Court would be required to appoint counsel to investigate any allegation of an appearance of impropriety,[15] creating the distinct likelihood of lengthy, costly and embarrassing ethical investigations that turn out to be totally without merit. The only difference between this interpretation and the requirement

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[14] That possibility is reinforced by the presence of the comma after "substantiated," setting the two phrases apart from the rest of the Rule. The commas both before and after the phrase "if substantiated" suggest that the sentence could read without that phrase. The insertion of that phrase must indicate an additional requirement. Otherwise, the Rule would be the same if the phrase were left out completely: "When misconduct or allegations of misconduct which would warrant discipline on the part of an attorney...."

[15] Judge Loken addressed this issue specifically with regard to an Independent Counsel:

> The question, then, is whether the judiciary should interfere in this process in the manner suggested by Judge McMillian and Judge Eisele, mounting judicial investigations of independent counsel whenever a citizen identifies an apparent political conflict of interest. In my view, the answer is a resounding no ... If judges undertake to 'investigate the investigators,' using vague standards such as apparent conflict of interest, it will inevitably politicize the judiciary and weaken legitimate efforts to weed out misconduct.

Starr v. Mandanici, 152 F.3d 741, 755-56 (8th Cir. 1998) (Loken, J., concurring).

that all grievances be automatically referred is the artfulness of the informant's pleading.[16] There is no question that this interpretation would create a new tool, over and above 28 U.S.C., Secs. 2254 and 2255 for virtually every criminal defendant found guilty and conceivably for many of those acquitted. Unlike the party to a civil action, a person who files an ethics grievance has no standing as a party, and the mere allegation of misconduct does not need to be accepted as true. The initiation of a disciplinary investigation against a lawyer is a serious matter that should not be initiated by the Court based on innuendo or rumor. Requiring a citizen to substantiate an allegation of misconduct protects the courts and the Bar from the disruption caused by investigations of a frivolous nature.[17]

Accordingly, the Court finds that it is not compelled to refer this matter automatically to counsel for investigation. In deciding whether to refer an allegation of impropriety to counsel for investigation, the Court must consider the nature of the allegation, any facts or other information supplied by the informant that would substantiate the allegation and the likelihood that the facts alleged and substantiated would lead to disciplinary action. The informant herein has certainly had ample opportunity to substantiate his allegations, having filed

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[16] An artful pleader could transform any trivial matter into an appearance of impropriety allegation.

[17] Indeed, although the Court has specifically found that Mandanici has made no allegations of misconduct which, if substantiated, would warrant discipline by this Court, it is interesting to speculate about the effect of a contrary opinion. If counsel were appointed to investigate the Office of Independent Counsel, would a team of lawyers and investigators delve yet again into the Tucker case? Both McDougal cases? The Smith case? The Jones case? All of the successful prosecutions of the OIC? Where would this end? Would we effectively venture into the impeachment proceedings? This Court finds no reason to waste further time and money of the American people by acting on the unsupported, or clearly refuted (and at times, patently frivolous), opinions and inferences set forth by Mr. Mandanici.

hundreds of pages of documents, along with his memoranda, to support his position.

ANALYSIS

Despite the fact that Mr. Mandanici's status is solely that of an informant and that once he brings his allegations to this Court's attention his part in the matter is ended, and the further finding that Rule V(A) provides this Court with the discretion to appoint counsel to investigate, this Court will nevertheless proceed to analyze the Mandanici allegations.[18] Hopefully, the following analysis answers the questions raised by grievant Mandanici and puts them to rest.

1. Allegations of Solicitation of False Testimony

Mandanici first contends that misconduct by Starr and his staff was revealed during the 1999 trial of Susan McDougal. Mandanici IV at 14. During that trial, Judge Howard allowed defense witnesses to testify about allegations that Starr and his staff attempted to solicit false testimony that would be incriminating to President Clinton. Id. at App. 11a (*A Gain for McDougal in Her Contempt Trial*, N.Y. TIMES, Mar. 31,1999, at A18 ("The judge in Susan H. McDougal's criminal contempt trial decided today to permit testimony from a Virginia woman [Julie Hiatt Steele] who says Kenneth W. Starr prosecuted her because she undercut the testimony of a Presidential accuser.")). Steele has filed a related grievance and has attached a transcript of her testimony in the McDougal

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[18] This decision to proceed is supported by the Eighth Circuit's decision in Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965) ("Because of the serious implications of the allegations of the complaint which, if true, could militate against the right of respondent to remain a member of the bar of the United States District Court for the District of Nebraska, we have looked beyond the technical aspects of the situation to ascertain whether there is any factual support for the accusations.").

trial. In this testimony, Steele contends that she thought she could avoid indictment by telling the OIC what they wanted to hear. See In re: Julie Hiatt Steele v. Kenneth W. Starr, Misc. No. 99-MC-162, Steele Grievance, App. A, at 2437 (Transcript of United States v. Susan H. McDougal, No. LR-CR-98-82 (E.D. Ark. Apr. 2, 1999)).

Further, Mandanici relies on news reports which detail statements made by McDougal and Steele. Both McDougal and Steele told reporters that they believed that the OIC was pressuring them to lie under oath. Mandanici IV at App. 11a-28a (Spring 1999 articles from New York Times, The Nation, Hartford Courant). Mandanici also points out that McDougal was acquitted on the obstruction of justice count at her trial in April 1999. Id. at 17. Further, he notes that one of the jurors stated afterwards that "he was convinced that McDougal honestly believed that Starr's office wanted her to lie, and that she feared she would be charged with perjury if she did not falsely implicate Clinton in wrongdoing." Id. at 17, App. 26a (Paul Duggan, *McDougal: Acquittal is a Victory over Starr*, HARTFORD COURANT, Apr. 13,1999).

While the Court notes that it may take judicial notice of news accounts, especially with regard to the appearance of impropriety,[19] none of the articles contained in Mandanici's appendix persuade the Court that it should appoint counsel to investigate this matter. Many of the articles are editorials or were written in publications that are historically partisan. If judges appointed counsel to investigate every allegation of ethical violations simply based on an editorial or a partisan article, any attorney in the public eye would be a potential

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[19] See May 30,1997 Mem. Op. at 18 (citing United States v. Tucker, 78 F.3d 1313,1322-23 (8th Cir. 1996) for the proposition that print media has the power to affect public perception). This Court notes, however, that articles relied upon in the Tucker case contained direct quotes from Judge Woods himself-quite a different scenario than the instant case.

target for investigation. Additionally, based on the Court's review, none of the articles detail any specific statement made by Starr or the OIC urging or attempting to coerce a witness to lie. Rather, the articles give accounts of McDougal's and Steele's subjective thoughts and responses.

The Court finds that the subjective opinions of witnesses (one of whom is a convicted felon and one of whom has admittedly made false statements), that they thought they could avoid legal problems if they testified falsely is insufficient to justify initiation of a disciplinary investigation of the prosecutor. It is doubtful that such question would even be asked if the prosecutor were anyone other than an Independent Counsel. Accepting as true for the sake of argument that McDougal and Steele thought that they could avoid further legal problems if they testified falsely, there is not one shred of support in the hundreds of pages of documents submitted by Mandanici to support these subjective opinions.

It is important to remember that not only are prosecutors allowed to be zealous in their positions, they have a duty to be zealous. Marshall v. Jerrico, Inc., 446 U.S. 238, 248, 100 S. Ct. 1610, 64 L. Ed.2d 182(1980) ("Prosecutors need not be entirely 'neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.") (citations omitted).[20] In order to arrive at the truth, prosecutors are afforded a great deal of discretion. They decide against whom to seek indictments, they choose who to interview, and they possess enormous investigative powers. Prosecutors are entitled to credit the testimony of one witness over another. Further, with regard to witnesses who change their stories, it is not unusual for a

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[20] See also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed.2d 1314(1935) (A prosecutor "may prosecute with earnestness and vigor-indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.").

prosecutor to threaten prosecution against a person he deems to be lying.

The evidence is clear that the OIC was attempting to find the truth (as any prosecutor is entitled-indeed, required-to do) and believed that McDougal and Steele were lying. See, eg., United States v. Lovasco, 431 U.S. 783, 795, 97 S. Ct. 2044, 52 L. Ed.2d 752(1977) (holding that prosecutor may wait to seek indictment "until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt"); United States v. Lacey, 86 F.3d 956, 965 (10th Cir. 1996) ("[T]he courts will not usurp the prosecutor's role in deciding when a particular case is strong enough to seek an indictment."); United States v. Brown, 959 F.2d 63, 66 (6th Cir. 1992) (defendant has a "vital interest[] in freedom from indictment prior to a showing of probable cause consistent with the Fourth Amendment"). Thus, Mandanici has failed to provide any evidence that the OIC's decisions to indict McDougal and Steele were anything other than legitimate enforcement of the law.

Furthermore, it is clear that Starr's zealous prosecution was not baseless. The validation of Starr's efforts is evident in his record of fourteen convictions in complex, high profile cases as well as the adoption by the House of Representatives of Articles of Impeachment against the President. Further, the OIC prevailed in seventeen out of eighteen appeals in matters it was handling. A record this successful could not have been established on baseless evidence. The Court has carefully reviewed all of the evidence produced and finds that there is no support for the allegation that Starr or the OIC attempted to solicit false testimony.

2. Letter of Sam Dash

Mandanici also asks the Court to appoint counsel to investigate whether Starr violated the Independent Counsel Act when be testified before the House Judiciary Committee in November 1998. Mandanici IV at 3. Prior to testifying, Starr provided the House with a complete report on the findings of the OIC regarding impeachment proceedings against President Clinton. According to Starr, he was then invited to testify before Congress "to summarize and explain the substance of [the] referral and the process that went into it." Id. at App. 74a (Starr's Nov. 20, 1998 letter to Sam Dash). Dash informed Starr that he was resigning as Starr's outside consultant and advisor as a result of Starr's acceptance of the House Judiciary Committee's invitation to testify. Dash wrote, "[i]n doing this you have violated your obligations under the Independent Counsel statute and have unlawfully intruded on the power of impeachment which the Constitution gives solely to the House." Id. at App. 71a. Dash informed Starr that he went beyond his limited duty "to objectively provide for the House substantial and credible information that may constitute grounds for impeachment." Id. Mandanici alleges that Dash's letter is evidence of Starr's violation of the Independent Counsel Act and should be sufficient to compel the Court to appoint counsel to investigate this alleged violation. Id. at 3, 39.

Starr responded to Dash on the same day and stated that Dash's letter "reflects an inaccurate view of the law, as well as the events that unfolded yesterday." Mandanici IV at App. 74a. Starr opines:

> [b]ecause the statute requires a written referral of information that "may constitute grounds for an impeachment"—and you supported our referral—it seems to me that it cannot reasonably be a violation of law to personally appear before Congress, at its

> invitation, to summarize and explain the substance of a referral and the process that went into it.

Id. Further, Starr explains, "Section 595(c) of the statute states, 'Nothing in this chapter ... shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.'" Thus, Starr writes, "an independent counsel can hardly cite the independent counsel statute as a basis for refusing to cooperate and appear before Congress in an impeachment proceeding, as you suggest we should have done." Id. Starr further stresses that he did not ask to appear before the Committee but was invited to do so, and no member of the Committee raised an objection to Starr's appearance. Finally, Starr counters Dash's allegation that "by appearing, [Starr] harmed public confidence in the independence of the Office." Instead, Starr asserts that "[a] refusal to appear would have suggested that we have something to hide, or that we are unwilling to defend and stand by the written referral." Id. at App. 75a.

The Court believes that this is a case where two very knowledgeable, well-respected attorneys simply differed in their interpretation of the law. This belief is underscored by a glance at the remainder of Dash's letter, the substance of which is notably absent from Mandanici's grievance. In the letter to Starr, Dash writes:

> My decision to leave has nothing whatsoever to do with the many unfounded and misinformed attacks on your conduct as Independent Counsel .... From my special vantage point, as an experienced professional outsider with no personal or professional stake in the outcome of your investigations, I found that you conducted yourself with integrity and professionalism as did your staff of experienced federal prosecutors.

Id. at App. 71a. Except for Starr's appearance at the pre-impeachment proceedings in the House, Dash endorses

Starr's actions as Independent Counsel. As Starr's ethical advisor, Dash essentially placed his imprimatur on all of Starr's actions up to the date that Starr testified before the House in November 1998. By asserting that Mr. Dash is the controlling authority, Mandanici seems to be conceding that most of his allegations are without merit.

Sam Dash is obviously a very well-respected attorney, hired by Starr to advise him on ethical issues. It has not been established, however, that Dash is the final decisionmaker with regard to the interpretation of the Independent Counsel statute, which has been the subject of much debate in recent years and throughout its history.[21] It certainly is not necessary for this Court to become involved in the fine distinctions drawn between these two highly regarded constitutional lawyers concerning their interpretation of the Independent Counsel Act. The suggestion that this difference of opinion should be the subject of an ethics investigation is ridiculous, especially when considered in light of Dash's otherwise staunch support of Starr's actions as Independent Counsel.

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[21] See Morrison v. Olson, 487 U.S. 654, 696-97, 108 S.Ct. 2597, 101 L.Ed.2d 569(1988) (upholding constitutionality of the Independent Counsel provisions in the Ethics in Government Act of 1978 against separation of powers challenge); see also In re Madison Guaranty Savings & Loan Ass'n, 187 F. 3d 652, 653 (D.C. Cir. 1999) (deciding not to terminate office of Independent Counsel); ROBERT B. FISKE, JR., TESTIMONY OF ROBERT B. FISKE, JR. HEARING ON INDEPENDENT COUNSEL ACT BEFORE UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, WASHINGTON D.C., MARCH 3,1999, 1999 WL 8086865 (detailing history of Independent Counsel statute). Additionally, many law review articles have been written on the subject. See, e.g., Joseph S. Hall et al., *Independent Counsel Investigations,* 36 Am. CRIM. L. REV. 809 (1999); Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options,* 43 ST. Louis U. L.J. 1047 (1999); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy,* 33 Am. CRIM. L. REV. 463 (1996); Joshua M. Perttula, *The Political Price of the Independent Counsel Law,* 25 HASTINGS CONST. L.Q. 257 (1998).

3. Matter before Chief Judge Johnson

Mandanici also asks the Court to note a matter currently before Chief Judge Norma Holloway Johnson in Washington, D.C. In 1998, Chief Judge Johnson found a prima facie case that Starr and his staff improperly leaked grand jury information in violation of Fed. R. Crim. P. 6(e)(2). Mandanici IV at 3, App. 1a (In re Grand Jury Proceedings, Misc. No. 98-228,1998 U.S. Dist. LEXIS 17290 (D.D.C. Sept. 25,1998)). Subsequent to an appeal to the District of Columbia Circuit and the issuance of the Court of Appeals' opinion,[22] Chief Judge Johnson appointed a special master to investigate 24 news reports, each of which she found to be evidence of a "prima facie violation" by Starr or his staff. Id. at App. 8a (Grand Jury Proceedings, 1998 U.S. Dist. LEXIS 17290, at *33).

Mandanici does not ask this Court to duplicate the investigation taking place in the District of Columbia but only raises this issue to demonstrate that the Court should reconsider his earlier grievance because there is "other evidence of misconduct by Mr. Starr." Because this Court is analyzing all of Mandanici's allegations, this issue is denied as moot.

4. Allegations of Conflicts of Interest

a) Pepperdine-Scaife

Mandanici contends that Starr labored under a conflict of interest when he indicated he was accepting an offer in February 1997 to become dean of the School of Public Policy at Pepperdine University, even though Starr formally turned down the offer in April 1998. Mandanici IV at 45. For

[22] In re Sealed Case No. 98-3077, 151 F.3d 1059, 1075-76 (D.C. Cir. 1998).

Mandanici, Starr's problem with accepting a deanship at Pepperdine has to do with Richard Mellon Scaife's contributions to the school. Id. Scaife has reportedly contributed "at least $340 million to conservative causes and institutions-about $620 million in current dollars, adjusted for inflation." Id. at App. 150a (Robert G. Kaiser & Ira Chinoy, *How Scaife's Money Powered a Movement,* WASHINGTON POST, May 2, 1999, at A1). "According to various media reports, [Scaife also] has used his fortune to press a media campaign discrediting President Clinton and suggesting that Vincent Foster, Jr., may have been murdered." May 30, 1997 Mem. Op. at 19.

Scaife reportedly contributed over $1 million of the $3 million in start-up costs for the School of Public Policy at Pepperdine. Mandanici IV at 45. However, Mandanici concedes that there is no evidence that Scaife and Starr had ever met and no evidence that Scaife played a role in Starr's selection for the deanship. Id. at App. 151a.[23] Consequently, Mandanici's allegation of an appearance of conflict of interest stems merely from the existence of Scaife's contribution and Starr's acceptance of a deanship. In essence, Mandanici argues that "without that one-third contribution to start the school then Mr. Starr would never have had that opportunity to collect that salary." Id. at 45. The Court declines to appoint investigative counsel based solely on this very dubious assertion.

Merely because Starr intended at the time to accept a deanship with a school that had conservative backers does not suggest that he was incapable of carrying out his duties as

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[23] The Washington Post reported, "Scaife and the current president of Pepperdine, David Davenport, both have said that Scaife played no role whatsoever in the offer to Starr. Scaife and Starr have said they don't know each other, and have never met." Mandanici IV at App. 151a (Robert G. Kaiser & Ira Chinoy, *How Scaife's Money Powered a Movement,* WASHINGTON POST, May 2, 1999, at A1).

Independent Counsel without bowing to the political desires of contributors whom he had never met. To adopt Mandanici's argument would prevent an Independent Counsel from accepting any future employment in academia, because most schools are financially supported by either liberal or conservative contributors, or both.[24] Mandanici also concedes that Starr ultimately decided to turn down the Pepperdine deanship in order to avoid possible problems. Id. at 45.[25] However, Mandanici argues:

> [b]ut that break from Mr. Scaife's financial strings may be difficult to maintain especially if Mr. Starr wants to associate himself with any conservative institution after he eventually resigns as independent counsel .... Assuming that Mr. Starr still espouses conservative causes such as those he would have advocated as dean of Pepperdine's School of Public Policy, it would be hard for Mr. Starr to find a position in conservative academia that Mr. Scaife has not touched as the "funding father" with his $620 million in contributions.

Id. at 46.

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[24] No doubt, many in academia would have trouble accepting Mandanici's assertion that a deanship is so desirable a position that a man who was a partner in a major national law firm, an Independent Counsel appointed to investigate the President, a former federal circuit judge and a former Solicitor General lacked the credentials to become a dean without "selling out" his credibility to one of the school's financial contributors.

[25] Seven months after the much publicized Pepperdine controversy, Starr's ethical advisor Sam Dash, a former Independent Counsel, Democrat and an authority relied upon by Mandanici, specifically stated in his November 1998 letter to Starr, that the many attacks on Starr's conduct as Independent Counsel were "unfounded and misinformed" and that he had conducted himself "with integrity and professionalism." Mandanici IV at App. 71a.

This is the stuff that dreams are made of. Mandanici seems to be arguing that in the future Starr is not allowed to take any job that has any connections with conservative organizations or Scaife. This Court has never heard a more absurd argument. Mandanici's rationale would prevent any Independent Counsel from having any political leanings at all. In fact, any prosecutor who left office and developed clients of conservative leanings (or liberal leanings, presumably) would almost necessarily violate this new theory of conflicts propounded by Mr. Mandanici. This Court does not believe that Congress intended such a consequence when enacting the Independent Counsel statute. See Judge Loken's concurrence in Starr v. Mandanici, 152 F.3d at 752-56.[26]

Further, if we accept for the sake of argument, Mandanici's claim that Scaife is out to "get" President Clinton and that Starr feels likewise, then why would Scaife want Starr to leave the position of Independent Counsel? It carries with it all the power regarding the various matters involved herein, including the possible criminal prosecution of the President after he leaves office. The idea that Scaife would want to lure Starr away from such a powerful position seems totally illogical. It is also interesting to note that Starr reportedly believed that Scaife was not a supporter of Starr's

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[26] Judge Loken wrote:

> History's message is clear-investigating misconduct by those in high office is bruising political work. That message is confirmed by our more recent experience under the Independent Counsel Act. Targets from both political parties have invariably decided that the best way "to blunt political damage posed by an investigation is to attack as biased the [Independent Counsel], or the judges that appointed him."

Id. at 755 (alteration in original). This Court notes that Judge Loken's words are even more relevant when one recalls that Mandanici also attempted to bring an ethics complaint against Judge Sentelle, a member of the Special Division that appointed Starr. See May 30, 1997 Mem. Op. at 2.

investigation because Scaife felt that the OIC was not vigilant enough in its investigation of President Clinton.[27]

The Court finds that there is no evidence that Starr's consideration of the deanship at Pepperdine or any potential future relationship with any other Scaife-funded conservative cause affected his performance as Independent Counsel or created an appearance of a conflict of interest. For these reasons, the Court will not appoint counsel to investigate this matter.

b) Resolution Trust Corporation

Mandanici's second appearance of conflict allegation involves Starr's investigation of the RTC. Mandanici contends that Starr labored under a conflict of interest by " 'refus[ing] to disqualify himself from decisions involving the Resolution Trust Corporation, an important agency in Whitewater matters, after being notified that the [RTC] had sued [Mr. Starr's own law firm] Kirkland & Ellis.'" Mandanici IV at 52, 166a (quoting from App. 166a: Editorial, *Mr. Starr's Conflicts*, N.Y. TIMES, Mar. 31, 1996, at 14E) (alteration in original). Starr investigated the RTC regarding its supervision of Madison Guaranty, a player in the Whitewater incident. Id. at App. 162a (Jane Mayer, *How Independent is the Counsel?*, NEW YORKER, Apr. 22,1996). The lawsuit between RTC and Kirkland & Ellis was filed in May 1993. Id. at App. 170a (Joe Conason & Murray Waas, *Troubled Whitewater: The Dual Roles of Kenneth W. Starr*, THE NATION, Mar. 18, 1996, at 14). RTC accused Kirkland & Ellis of " 'aiding and abetting breaches of fiduciary responsibility' at a Colorado

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[27] See Eric Pooley & Michael Weisskopf, *How Starr Sees It-Probing the Prosecutor*, TIME MAGAZINE, Dec. 28, 1998, at 82, *available in* 1998 WL 25187468 (reporting that Starr "saw Scaife as one of his own harshest critics because Scaife's minions had attacked a Starr report concluding that Vince Foster killed himself").

thrift, the First America Savings Bank." Id. The parties eventually settled the case for $325,000.00 in January 1996. Id. at App. 173a.

Mandanici cites an article which alleges that "some of the same officials whose conduct Starr [] investigat[ed] were involved in the decision to sue his law firm." Id. at App. 170a. Although as Michael Shaheen of the DOJ noted, this may be tantamount to "a technical conflict of interest" because Starr was a senior partner at Kirkland & Ellis and has acted on its management committee, there is no indication that Starr had any connection with the RTC lawsuit. In fact, one of Mandanici's cited news editorials concedes that "Mr. Starr was not involved in the negotiations and did not know about the suit at the time he was appointed as Whitewater counsel." Id. at App. 166a (Editorial, *Mr. Starr's Conflicts,* N.Y. TIMES, Mar. 31, 1996, at 14E). Further, Mandanici brings forth no evidence that the presence of this lawsuit affected Starr's ability to carry out his duties as Independent Counsel. In fact, Mandanici includes an article in his appendix which reports that when Starr learned of the lawsuit between RTC and Kirkland & Ellis, "he offered to recuse himself from any dealings with the [RTC], something that [his ethical advisor] Dash deemed unnecessary." Id. at App.162a (Jane Mayer, *How Independent is the Counsel?,* NEW YORKER, Apr. 22, 1996).[28]

The now-defunct RTC sued a great number of law firms in connection with the failed savings and loan crisis. Indeed, the Court notes that it would have been difficult for a large law firm practicing banking law, such as Kirkland & Ellis, to avoid some involvement with the RTC during this

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[28] Another included editorial notes, "Mr. Starr's ethics counsel, Sam Dash ... says there is no need for Mr. Starr to distance himself from aspects of Whitewater involving the [RTC]." Id. at App. 166a (Editorial, *Mr. Starr's Conflicts,* N.Y. TIMES, Mar. 31, 1996, at 14E). The Court notes that this article was included by Mr. Mandanici.

period. Thus, it is unrealistic to suggest that Starr unknowingly labored under a conflict of interest simply because his very large law firm was engaged in litigation with this very large organization. Additionally, even though the Court acknowledges that it is not bound by the findings of the DOJ investigation due to the DOJ's stricter standards for investigation, the Court finds it persuasive that the DOJ found " 'no information to support the proposition that such a conflict, if in fact it ever actually existed, substantially impair[ed] Judge Starr's current ability to carry out the duties of his office.'" May 30, 1997 Mem. Op. at 3-4.[29] If the DOJ determined that Starr committed a violation of 28 U.S.C., Sec. 594(j),[30] it surely would have investigated the matter further. Contrary to Mandanici's assertion, the evidence he presents clearly indicates that there was no suggestion of bias or conflict in Starr's handling of the matter involving the RTC. There is no reason to appoint counsel to investigate this matter.

c) Ties to the Tobacco Industry

Finally, Mandanici contends that Starr suffered a conflict of interest because of his alleged ties to the tobacco industry. Mandanici IV at 50. While acting as Independent Counsel, Starr remained a partner at Kirkland & Ellis. On behalf of Kirkland & Ellis, Starr represented two tobacco companies, Brown & Williamson and Phillip Morris. Id. at App. 161a (Jane Mayer, *How Independent is the Counsel?*, NEW YORKER, Apr. 22, 1996). According to an article cited

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[29] Consequently, Judge Eisele explained that "[i]n light of the Justice Department's response regarding the older RTC allegations, the Court no longer finds any reason to address the RTC allegations." May 30, 1997 Mem. Op. at 5.

[30] 28 U.S.C., Sec. 594(j) details the standards of conduct applicable to the Independent Counsel.

in Mandanici's appendix, "Starr [] has been the counsel of record, representing cigarette manufacturers in the appeal of a ruling permitting millions of American smokers to join in a potentially ruinous class action suit." Id. A Wall Street Journal article reported that the appeal "involve[d] arcane legal issues," and noted that "in his briefs Mr. Starr attack[ed] the notion that nicotine is uniformly addictive, although he doesn't deny its addictive potential." Id. at App. 165a (Glenn R. Simpson, *Starr's Legal Work for Tobacco Industry, Others Raises Eyebrows over Independent Counsel Role,* WALL ST. J., Mar. 27, 1996).

Mandanici contends that Staff's representation was improper in light of the tobacco industry's alleged ties with the Republican party and the industry's "campaign to get Clinton." Id. at 50. In reference to President Clinton's impeachment, Mandanici argues that "[n]othing would please the tobacco companies more than for Mr. Starr to weaken, if not remove from office, an enemy who just might have as much clout as the tobacco companies." Id. at 51. He points out that the Wall Street Journal reported that Sam Dash believed that Starr's representation of private clients while investigating Clinton "ha[d] an odor to it." Id. at 50, App. 157a (Jane Mayer, *How Independent is the Counsel?,* NEW YORKER, Apr. 22, 1996). Mandanici alleges that there was "the rather tawdry appearance that Mr. Starr not only consciously tailored his prosecutorial discretion but abused his power to please the tobacco companies which were paying him large sums of money in attorney fees." Id. at 51.

The Court finds this allegation to be nonsense. There is no indication that Starr tailored his work as Independent Counsel in an attempt "to please the tobacco companies." Further, there is no evidence that the tobacco companies represented by Starr attempted to influence his investigation. Even assuming that the heads of the tobacco companies are totally Republican (an assumption which the Court finds absolutely ridiculous), they are entitled to hold their own

political beliefs, as is an Independent Counsel (and as is one who brings grievances before this Court). The Court, however, rejects the inference, absent any specific evidence, that political beliefs caused the representatives of Brown & Williamson or Phillip Morris to attempt in any manner to influence Starr's investigation or that those political beliefs caused Starr to tailor his investigation "to please" an outside party. In this country, tobacco companies, like other persons or businesses, are entitled to legal representation. Likewise under the Independent Counsel law, Starr was entitled to practice law, representing private clients.

An article in Mandanici's appendix notes that "the independent counsel law was drawn to encourage part-time appointees in order to attract top-flight lawyers who don't want to give up their practices." Id. at App. 165a (Glenn R. Simpson, *Starr's Legal Work for Tobacco Industry, Others Raises Eyebrows over Independent Counsel Role,* WALL ST. J., Mar. 27, 1996); see also 28 U.S.C., Sec.594(j) (articulating restrictions placed on Independent Counsels and their law firms vis-à-vis clients). Further, although Mandanici noted part of Dash's statement with regard to Starr's decision to continue representing private clients, Mandanici failed to note the portion of the article that stated that Dash felt that "[w]hat [Starr is] doing is proper." Id. at App. 157a (Jane Mayer, *How Independent is the Counsel?,* NEW YORKER, Apr. 22, 1996). Further, Dash stated that, "Starr's decision to continue representing private clients while investigating the President violates neither professional ethics as they are narrowly defined for legal purposes, nor the law that specifies the duties of an independent counsel." Id. Another article included in Mandanici's appendix reports that "Sam Dash, whom Mr. Starr hired as an ethics counselor, says none of Mr. Starr's activities pose a conflict of interest." Id. at App. 165a (Glenn R. Simpson, *Starr's Legal Work for Tobacco Industry, Others Raises Eyebrows over Independent Counsel Role,*

WALL ST. J., Mar. 27, 1996).[31] Those statements suggest that appointment of counsel to investigate this matter would be unnecessary and improvident.

Mr. Mandanici's main quarrel would seem to be with Congress in permitting an Independent Counsel to retain his or her private law practice. Part of this question has since been resolved, of course, by the recent Congress in allowing the Independent Counsel statute to expire. Clearly, the Court is obliged to decline to appoint counsel to investigate the tobacco matter.

A FINAL MATTER

At the time this matter was assigned to this writer, the parties were informed that the assignment of the matter and all issues related to it would remain under seal until further order

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[31] Notably, this article also reports that "Mr. Dash, a liberal Democrat, also says Mr. Starr has gone to great lengths to be fair in his investigation and has created an elaborate process to guard against any bias creeping into decision making." Mandanici IV at App. 165a. This sentiment was also noted in another article in Mandanici's appendix:

> Starr has taken steps to assure the public of his evenhandedness. In addition to hiring Dash, . . . he also chose a Democrat to oversee the highly sensitive Washington end of his investigation: Mark Tuohey, a former president of the District of Columbia Bar Association. (In addition, Tuohey, unlike Starr-but like many of Starr's hires-had experience as a prosecutor.) Tuohey has since left the investigation but he continues to admire Starr, about whom he says, "I was convinced he wasn't going to play it politically; otherwise, I wouldn't have gotten involved." He says Starr has set up an elaborate system in the office to insure that all major decisions are made by consensus, "in order to avoid mistakes." And he argues that so far the results have validated the investigation. "With eight indictments and nine pleas, clearly it has been merited. Clearly there's been conduct which has been criminal."

Id. at App. 161a-162a (Jane Mayer, *How Independent is the Counsel?*, NEW YORKER, Apr. 22, 1996).

of this Court. Even though he is appearing pro se, Mr. Mandanici is an attorney and knows the meaning of these words. Mr. Mandanici was obviously the source of a news report that appeared in a Connecticut paper indicating that this Court had accepted assignment of the matter and indicated that Mandanici "has a case." See Thomas Scheffey, *Catch a Falling Starr?,* CONNECTICUT LAW TRIBUNE, Feb. 22, 2000. This interview and leak was a violation of this Court's Order and was false. Another improper disclosure resulted in an article in an Arkansas paper. See Linda Satter, *Judge Named to Handle Grievances Against Starr,* ARKANSAS DEMOCRAT-GAZETTE, February 9, 2000.

In addition, Mandanici submitted a copy of a letter in this matter to a person who clearly should not have received such copy. This conduct constitutes three direct violations of this Court's Order. Unlike the inferences and assumptions that formed the basis of Mandanici's complaints about Starr's conduct, Mandanici's three known violations of this Court's Order merit serious consideration of both discipline and sanctions, matters that this Court may consider at a later date.

CONCLUSION

For the foregoing reasons and in the exercise of its discretion, the Court declines to appoint counsel to investigate the matters set forth in Mandanici IV.

/s/ John F. Nangle

UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET
IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
ON 5/18/00 BY IMT
Dated May 18, 2000

3. RULING OF THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2545EALR	*	
	*	
Francis T. Mandanici,	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and for
	*	Rehearing En Banc
Kenneth W. Starr,	*	
Appellee	*	

The petition for rehearing en banc is denied. Judge Richard S. Arnold and Judge Morris Sheppard Arnold took no part in the consideration or decision of this case. The petition for rehearing by the panel is also denied.
(5128-010199)

September 26, 2000

Order Entered at the Direction of the Court
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

4. RULE V OF THE MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT

Disciplinary Proceedings.

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgment of counsel should be awaited before further action by this Court is considered or for any other valid reason, counsel shall file with the Court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of this Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days after service of that order upon that attorney, personally or by mail, why the attorney should not be disciplined. The order to show cause shall include the form certification of all courts before which the respondent-attorney is admitted to practice, as specified in form appended to these Rules.

D. Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation this Court shall set the matter for prompt hearing before one or more Judges of this Court, provided however that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three other Judges of this Court appointed by the Chief Judge, or, if there are less than three Judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals for this Circuit. The respondent-attorney shall execute the certification of all courts before with that respondent-attorney is admitted to practice, in the form specified, and file the certification with his or her answer.

5. RULE X OF THE MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT

Appointment of Counsel.

Whenever counsel is to be appointed pursuant to these Rules to investigate allegations of misconduct or prosecute disciplinary proceedings or in conjunction with a reinstatement petition filed by a disciplined attorney this Court shall appoint as counsel the disciplinary agency of the Supreme Court of Arkansas, wherein this Court sits, or the attorney maintains his principal office in the case of the Courts of Appeal or other disciplinary agency having jurisdiction. If no such disciplinary agency exists or such disciplinary agency declines appointment, or such appointment is clearly inappropriate, this Court shall appoint as counsel one or more members of the Bar of this Court to investigate allegations of misconduct or to prosecute disciplinary proceedings under these Rules, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or has been engaged as an adversary of the respondent-attorney in any matter. Counsel, once appointed, may not resign unless permission to do so is given by this Court.

6. LETTER OF RESIGNATION OF SAMUEL DASH

GEORGETOWN UNIVERSITY LAW CENTER

Samuel Dash
Professor of Law

November 20, 1998

Honorable Kenneth W. Starr
Independent Counsel
Suite 490 N.
1001 Pennsylvania Avenue NW
Washington, D.C. 20004

Dear Ken:

I hereby submit my resignation as outside consultant and advisor to you and your Office of Independent Counsel, effective at noon today.

My decision to leave has nothing whatsoever to do with the many unfounded and misinformed attacks on your conduct as Independent Counsel. Through most of your tenure, I have been fully informed by you and your staff on all major decisions made by your office. I have advised you on these matters and have approved most of the decisions made. On some I agreed with you and your staff at the outset. As to others, where I disagreed, you showed your willingness to be open to my advice and you came to different decisions. From my special vantage point, as an experienced professional outsider with no personal or professional stake in the outcome of your investigations, I found that you conducted yourself with integrity and professionalism as did your staff of experienced federal prosecutors.

I resign for a fundamental reason. Against my strong advice, you decided to depart from your usual professional decision-making by accepting the invitation of the House Judiciary Committee to appear before the committee and serve as an aggressive advocate for the proposition that the evidence in your referral demonstrates that the President committed impeachable offenses. In doing this you have violated your obligations under the Independent Counsel statute and have unlawfully intruded on the power of impeachment which the Constitution gives solely to the House. As Independent Counsel you have only one narrow duty under the statute relating to the House's power of impeachment. That one duty, under Section 595(c) of the statute, is to objectively provide for the House substantial and credible information that may constitute grounds for impeachment.

The statute does not, and could not constitutionally give the Independent Counsel any role in impeachment other than this single informing function. The House is not dependent on the Independent Counsel for information related to its impeachment role. It can get its information from many sources, including through its own process, and does not need a referral of information from the Independent Counsel before it can decide to have an impeachment inquiry. The referral you made to the House was proper under the statute. But your role and authority as a provider of information to the House stopped there. You have no right or authority under the law, as Independent Counsel, to advocate for a particular position on the evidence before the Judiciary Committee or to argue that the evidence in your referral is strong enough to justify the decision by the Committee to recommend impeachment. Constitutionally, as you have recognized, the House has the *sole* power of impeachment. As an executive branch independent prosecutor you may not intrude on that sole power, even if invited by the Committee.

Your referral to the House under the statute presented all the evidence you had about the Lewinsky matter which you believed was substantial and credible. As I have said, that was your only lawful responsibility under the statute governing your office. The House Committee has excellent lawyers advising it and did not need you to summarize your referral and to argue for impeachment. Indeed the Committee does not have a right to impose upon you as Independent Counsel to be its prosecuting counsel for impeachment. By your willingness to serve in this improper role you have seriously harmed the public confidence in the independence and objectivity of your office. Frequently you have publicly stated that you have sought my advice in major decisions and had my approval. I cannot allow that inference to continue regarding your present abuse of your office and have no other choice but to resign.

Sincerely,

/s/ Samuel Dash
Samuel Dash

7. ASSOCIATED PRESS ARTICLE PUBLISHED IN THE WASHINGTON POST, MAY 21, 2000

Judge Denies Bid for Probe of Starr

Associated Press

LITTLE ROCK- A federal judge has rejected a request for an investigation of former independent counsel Kenneth W. Starr, saying that claims that Starr or his staff tried to suborn perjury or engaged in misconduct in the Whitewater investigation are baseless.

Connecticut lawyer Frank Mandanici and two former Starr targets, Stephen A. Smith and Julie Hiatt Steele, challenged Starr's prosecution of Whitewater figure Susan McDougal and Starr's testimony before a House committee on President Clinton's relationship with Monica S. Lewinsky.

In an order Thursday, U.S. District Judge John F. Nangle said Steele presented "absolutely no evidence that the [Office of Independent Counsel] ever directly or impliedly asked her to lie."

The judge said he found no evidence that Starr or his office attempted to suborn perjury from Smith and noted that Smith acknowledged that Starr investigators never asked him to lie.

The judge said Mandanici might merit discipline and sanctions himself for violating the judge's order against leaking matters related to the case to the news media.

A former aide to Clinton when he was governor of Arkansas, Smith pleaded guilty in 1995 to a misdemeanor stemming from Starr's investigation.

A federal jury deadlocked in favor of convicting Steele on charges that she obstructed Starr's investigation of allegations by Kathleen Willey that Clinton made an unwanted sexual advance.

Starr decided not to retry Steele, who denied Willey's assertion that she confided the alleged advance to her friend hours after it happened. [end]

8. EDITORIAL IN THE WASHINGTON POST, MAY 24, 2000

Legal Ethics and Spin

THROUGHOUT THE Monica Lewinsky scandal, the White House tried to turn the tables on Kenneth Starr by making the prosecutor's conduct – rather than the president's – the issue. In the White House version of events, a vindictive and ideological motivated prosecutor seized on purely personal misconduct by the president and violated all manner of ethical rules to bring him down. The allegations of prosecutorial misconduct did, in fact, divert attention from Mr. Clinton's own behavior and greatly weakened public confidence in Mr. Starr's investigation. So it is worth asking, which, if either, of these men turns out to have a real problem under the rules of legal ethics. Conveniently, Mr. Starr and Mr. Clinton both faced reckonings on this score over the past week. Last Thursday a federal judge threw out a series of ethical allegations against Mr. Starr. Four days later a disciplinary panel of the Arkansas Supreme Court decided that Mr. Clinton should be disbarred.

The disbarment recommendation is hardly a surprise. The false testimony that just about everybody understands Mr. Clinton gave under oath in the Paula Jones case clearly conflicts with the obligation of candor that a lawyer owes to the judicial system. The recusal of eight of the 14 members of the disciplinary committee – those with ties to the president – will inevitably raise questions about whether Mr. Clinton is being judged by political foes. But the reality is that the committee's options are limited. The evidence that Mr. Clinton lied is overwhelming. Judge Susan Webber Wright held as much in finding him in contempt of court. To have ignored so public a flouting of the ethical rules would have made a joke of the disciplinary process – a joke the committee could not afford. The only real question is whether a

reprimand or a suspension from the bar is an adequate alternative to disbarment. It's not a flattering question.

The contrast with the ruling on Mr. Starr's conduct is quite striking. In unusually strong language, Senior U.S. District Judge John Nangle dismissed a series of misconduct complaints brought against the former independent counsel by a Connecticut lawyer named Francis Mandanici. Judge Nangle found "no support for the allegation" that Mr. Starr or his colleagues had tried to get people to testify falsely. And he described the contention that Mr. Starr harbored a potential conflict of interest with respect to conservative philanthropist Richard Mellon Scaife as "the stuff that dreams are made of." He called other allegations "nonsense" and "ridiculous." Whatever one thinks of Mr. Starr's investigation, and we have expressed our own reservations, Judge Nangle's opinion offers powerful vindication on some of the leading ethical charges.

Charges involving leaks and other issues remain to be resolved against Mr. Starr's former office. And the disbarment recommendation against Mr. Clinton is still only a recommendation. But the week's events make pretty clear which of the lawyers in this battle, Mr. Starr and Mr. Clinton, was the one with the ethical problems. [end]

Submitted By

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